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BY THE SAME AUTHOR.

A TREATISE ON SUSPENSION OF THE POWER OF ALIENATION, AND POSTPONEMENT OF VESTING, UNDER THE LAWS OF NEW YORK, MICHIGAN, MINNESOTA, AND WISCONSIN.

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A TREATISE

ON

EXPRESS TRUSTS AND POWERS

UNDER THE NEW YORK REVISED STATUTES
AND THE REAL PROPERTY LAW OF 1896

WITH AN APPENDIX

CONTAINING A TABLE SHOWING THE SOURCES OF THE SECTIONS CITED,
AND A TABLE OF COMPARATIVE TEXTS OF THE REVISED
STATUTES AND THE REAL PROPERTY LAW

BY

STEWART CHAPLIN

AUTHOR OF

"SUSPENSION OF THE POWER OF ALIENATION"

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PREFACE.

Trusts and powers, as they existed prior to the first of January, 1830, were on that date abolished in New York, with some exceptions, when certain statutory provisions, codifying the law of these subjects, went into effect. Since that time, the courts, in several thousand reported cases, have filled in the outlines laid down in the statutes, and developed a system of law harmonious and nearly complete.

On October first, 1896, the Real Property Law (L. 1896, Ch. 547) went into effect. This, in turn, repealed the earlier statutes, with a few exceptions, re-enacted most of them, in a changed form, and added some new provisions. Eighty-seven sections relating particularly to express trusts and powers embody more than three hundred changes, of which the greater part are trivial, some evidently change the law, and others, apparently without design, seem, as a matter of grammatical construction, to overturn well-settled principles. The following pages include a consideration of these changes.

Although our statutes have deprived the general treatises on trusts and powers of much of their value for local use, there has been hitherto no attempt to present a systematic and detailed statement of the law of New York in this field.

In the preparation of this book much assistance has been derived from the valuable notes of Professor Ames in his "Cases on Trusts," and the well-known articles by the same writer in the Harvard Law Review, and also from the able treatise of Mr. Farwell on Powers.

Attention is called to the fact that in addition to the index and the usual tables of cases and statutes cited, there are also a table showing the sources of the sections cited from the Real Property Law; a table of comparative texts, giving side by side the sections of the Revised Statutes and the corresponding sections of the Real Property Law relating to express trusts and powers; and a table of index topics.

S. C.

New York, January, 1897.

TABLE OF CONTENTS.

PREFACE 3
TABLE OF CASES CITED 13
TABLE OF STATUTES CITED 41
APPENDIX 655
I. TABLE SHOWING SOURCES OF STATUTES CITED 655
II. TABLE OF COMPARATIVE TEXTS 659
TABLE OF INDEX TOPICS 681
INDEX 683

PART I.

CHAPTER I.

INTRODUCTION 1

CHAPTER II.

CREATION OF EXPRESS TRUSTS.

(1) Who may Create 19–21
(2) Essential Elements 21–27
(3) The Trust Instrument 27–38
(*a*) Real Property 27–37
(*b*) Personal Property 37–38
(4) Delivery 38–54
(5) Consideration 54–67

CHAPTER III.

The Trustee.

(1) Who may be 68–76
(2) Appointment of Trustee 76–91
Introductory 76–78
(*a*) By Supreme Court 78–88
(*b*) By Surrogate's Court 88–91
(*c*) By Third Party 91
(3) The Trustee's Title 91–125
(*a*) Legal and Equitable Title 91–105
(*b*) Trustee's and Executor's Title distinguished 105–112
(*c*) Incidents and Results of Title 113–125
(4) The Trustee's Authority 126–134
(5) The Trustee's Duties 134–169
In general 134–138
Disinterestedness 138–141
Impartiality 141–144
Investments 144–157
Accounting 157–169
(6) The Trustee's Liability 169–215
In general 169–185
Bond, Sureties 185–195
Acts of Co-trustees 195–205
Costs and Security 205–211
Where the Trust is Void 211–215
(7) The Trustee's Rights 215–235
Commissions 215–231
Allowances for Expenses 231–235
(8) Renunciation 235–237
(9) Resignation 237–239
(10) Removal 239–245

CHAPTER IV.

The Beneficiary.

(1) Who may be 246–251
(2) How to be designated 251–257

(3) Beneficiary of Specific Share..... 257
(4) Tenancy.....257–259
(5) Beneficiary's Rights.....259–265

CHAPTER V.

The Trust Property..... 266

CHAPTER VI.

The Trust Term..... 272

CHAPTER VII.

The Trust Purpose.

(1) Real Property.....282–307
Introductory.....282–285
To Sell for Creditors.....285–289
To Sell, Mortgage or Lease.....289–292
To Receive and Apply Rents..... 292
To Receive and Accumulate.....292–307
(2) Personal Property.....307–311

CHAPTER VIII.

Rents, Issues and Profits.

(1) Corpus and Income Distinguished.....312–320
(2) Deductions from Gross Income.....320–329
In general..... ...320–321
What deducted.....321–323
What not deducted.....323–329
(3) Method of Apportioning Deductions.....329–337
(4) Apportioning Rents and Annuities.....337–340
(5) From and to when computed.....340–342
(6) Receipt of Rents.....342–352
In general..... 342
Authority to Lease.....342–350
Under Trusts to Lease.....350–352
(7) Application of Rents.....352–376

CHAPTER IX.

Transfer of Beneficial Interests.

Introductory.....377–378
Under the Revised Statutes.....378–385
Under the Real Property Law.....385–386

CHAPTER X.

Charitable Uses and Trusts.

Introductory.....387–388
Prior to May 13, 1893.....388–392
Since May 13, 1893.....392–394

CHAPTER XI.

Attempted Express Trusts.

(1) Valid Express Trusts..... 395
(2) Trusts valid as Powers.....395–396
(3) Passive Trusts.....396–399
(4) Trusts valid as Charges..... 399
(5) Void Trusts.....400–402
(6) Secret Trusts.....402–405
(7) Void as to Third Parties..... 406
(8) Devolution of Title.....406–409

CHAPTER XII.

Termination and Extinction of Trusts..... 410

PART II.

CHAPTER XIII.

The Law of Powers..... 421

CHAPTER XIV.

POWERS DEFINED AND CLASSIFIED..... 424

CHAPTER XV.

THE CREATION OF POWERS.

(1) Who may create..... 433
(2) Powers, how created.....433–444
(3) The Legal Title.....444–452

CHAPTER XVI.

BENEFICIAL POWERS.

(1) When they involve a fee.....453–458
(2) When fee not involved.....459–465

CHAPTER XVII.

POWERS IN TRUST.

(1) When Imperative.....466–469
(2) When Discretionary.....469–472

CHAPTER XVIII.

THE DONEE OF THE POWER.

In general.....473–493
Executor as Donee 479–492
Charges, Assets.....480–485
Executorial, trust or personal capacity.....486–492

CHAPTER XIX.

THE BENEFICIARY OF THE POWER..... 494

CHAPTER XX.

THE PURPOSE OF THE POWER..... 502

CHAPTER XXI.

The Execution of Powers.

(1) Method, Scope and Time of Execution.....508–524
(2) Two or more Donees.....524–530
(3) Consent of Third Person.....530–533
(4) Failure to recite Power.....533–536
(5) Effect of a General Devise.....536–539
(6) Disposition too Extensive.....539–543
(7) Fraudulent Execution.....543–550
(8) Defective Execution.....550–553
(9) Default in Execution.....553–554
(10) Void Execution..... 554
(11) Equitable Conversion.....554–559

CHAPTER XXII.

Relation of Powers to Suspension..... 560

CHAPTER XXIII.

Powers of Revocation.

(1) Power to revoke a Power..... 566
(2) Power to revoke a Grant.....566–567
(3) Power to revoke execution of Power.....567–568

CHAPTER XXIV.

Termination and Extinction of Powers..... 569

PART III.

CHAPTER XXV.

Third Parties.

(1) Creditors.....578–590
(2) Beneficiary's Wife and Children.....590–595
(3) Purchasers and Encumbrancers.....596–602
(4) Remaindermen..... 602
(5) Dowress.....602–604

CHAPTER XXVI.

JUDICIAL CONTROL 605

CHAPTER XXVII.

THE STATUTE OF LIMITATIONS 611

CHAPTER XXVIII.

SEPARABILITY 623

CHAPTER XXIX.

CONFLICT OF LAWS 629

CHAPTER XXX.

CONSTRUCTION.

(1) Jurisdiction of the Supreme Court.....636–640
(2) Jurisdiction of the Surrogate 640–641
(3) *Res Adjudicata*.....641–642
(4) Principles of Construction.. 642–646

CHAPTER XXXI.

APPLICATION OF STATUTES TO PERSONALTY 647

TABLE OF CASES CITED.

References are to pages.

Aaron, Matter of, 235
Abramowitz *v.* Citizens' Sav. Bank, 47
Ackerman *v.* Emott, 144
Ackerman *v.* Gorton, 457, 462, 465, 589
Adair *v.* Brimmer, 149, 150, 151, 174, 181, 196, 198, 201, 202
Adams *v.* Adams, 42, 43, 81
Adams *v.* Becker, 640
Adams *v.* Perry, 355, 397, 400, 442, 499, 558, 623, 626, 627
Adsit *v.* Adsit, 449, 603
Ætna Nat. Bank *v.* Fourth Nat. Bank, 262
Ahern *v.* Steele, 115, 344, 349
Akin *v.* Kellogg, 603
Albany F. I. Co. *v.* Bay, 502, 512, 584
Albertson, Matter of, 320, 323
Albrecht *v.* Pell, 77, 410. 474
Aldrich *v.* Funk, 100, 507
Alexander *v.* Alexander, 423
Alger *v.* Conger, 206
Alger *v.* Scott, 52, 53
Alkus *v.* Goettmann, 437
Allen, Matter of, 219, 229
Allen *v.* Allen, 280, 563
Allen *v.* Cowan, 44
Allen *v.* DeWitt, 513, 514, 520, 552, 559
Allerton *v.* Lang, 46, 60
Allport *v.* Jerrett, 520
American Bible Soc'y *v.* Stark, 465.
Ames *v.* Downing, 139
Amory *v.* Lord, 75, 623
Anderson *v.* Anderson, 159, 638, 639, 640
Anderson *v.* Davison, 466, 517
Anderson *v.* Mather, 69, 94, 131, 285, 398, 511, 606
Anderson *v.* Thomson, 48
Andrews *v.* Whitney, 582, 593, 595
Annett *v.* Terry, 192
Anonymous, 163
Anonymous, 521
Anonymous *v.* Gelpcke, 123, 605
Anstice *v.* Brown, 246
Anthony *v.* Harrison, 64, 65, 66
Anthony *v.* Wood, 579
Antrobus *v.* Smith, 62, 63
Aplington, Matter of, 234
Appley, Matter of, 590, 591
Archer, Matter of, 233
Architectural I. W. *v.* City of B'klyn, 211
Arcularius *v.* Geisenhainer, 96, 248
Armstrong *v.* McKelvey, 558, 572, 575, 576
Arnold *v.* Gilbert, 468, 559, 626
Arnoux *v.* Phyfe, 512, 514
Arthur *v.* Arthur, 297
Arthur *v.* Nelson, 155, 181, 228
Asche *v.* Asche, 28, 97, 247, 248, 418, 460, 555, 557, 603
Aspinwall *v.* Pirnie, 285.
A. S. R. Co. *v.* Fancher, 263
Atty.-Gen. *v.* Guardian M. L. I. Co., 231
Atty.-Gen. *v.* N. A. L. I. Co., Matter of, 234
Atty.-Gen. *v.* North Am. L. I. Co., 231
Austin *v.* Munro, 125, 126, 128
Austin *v.* Oakes, 494, 519, 536, 541, 567, 568
Aymar, Matter of, 218
Ayrault, Matter of, 158, 159, 161

Babcock, Matter of, 321
Babcock, Matter of, 224
Bach, Matter of, 139, 183
Backer, Matter of, 286
Backes, Matter of, 309
Bacon *v.* Bacon, 23, 224
Baer, Matter of, 496, 499
Baier *v.* Baier, 238
Bailey, Matter of, 233, 234
Bailey *v.* Bailey, 278, 281, 410
Bailey *v.* Briggs, 523, 636, 638
Bain *v.* Matteson, 237, 487, 489, 491
Baird *v.* Baird, 55, 65, 66
Baker, Matter of, 381
Baker *v.* Disbrow, 176
Baker *v.* Lorillard, 540

References are to pages.

Baker *v.* N. Y. Nat. Exch. Bank, 263, 264
Baldwin *v.* Isham, 148, 358, 363, 379
Baldwin *v.* Roche, 550
Baldwin *v.* Smith, 163, 641.
Baldwin *v.* Smith, 168
Banks *v.* Wilkes, 195, 198
Banning *v.* Gunn, 367
Barber *v.* Cary, 423, 517, 530, 532, 533, 550
Barbour *v.* DeForest, 295, 298, 370, 375, 376
Barker *v.* Crosby, 626
Barker *v.* Smith, 139
Barnard v. Crossman, 18, 73, 645, 646
Barnard *v.* Gantz, 20, 37, 66, 413
Barnes, Matter of, 172, 175, 176, 234
Barnes, Matter of, 341
Barnes *v.* Morgan, 268
Barrow *v.* Barrow, 341
Barry *v.* Lambert, 30, 31, 37, 55, 154, 307
Barton *v.* Hosner, 446
Barton's Trust, 317
Bascom *v.* Albertson, 79, 388, 389, 632, 635
Bates *v.* L. M. Co., 7
Bates *v.* Underhill, 357
Bean *v.* Bowen, 295, 307, 626
Bean *v.* Tonnele, 614
Bear *v.* Am. R. T. Co., 243
Beard, Matter of, 111, 224
Beard *v.* Beard, 177, 223, 226, 227
Beardsley *v.* Hotchkiss, 20, 302, 303, 352, 451, 561, 653, 654
Beaver *v.* Beaver, 21, 38, 42, 48, 51, 54, 67
Beaver *v.* Beaver, 21, 48, 67
Beck *v.* McGillis, 71, 506
Becker *v.* Lawton, 238
Bedell *v.* Barnes, 206
Bedell *v.* Carll, 40, 50
Beekman *v.* Bonsor, 24, 235, 236, 237, 354, 355, 397, 410, 487
Beekman *v.* Vanderveer, 262
Beeman *v.* Beeman, 14, 38, 267
Beer *v.* Beer, 340
Beers *v.* Shannon, 125
Behrman *v.* Von Heyn, 532, 533, 601
Bell *v.* Hepworth, 183, 184, 268
Bell *v.* Warn, 461, 462
Bellinger *v.* Shafer, 285, 323, 569
Belmont *v.* O'Brien, 91, 130, 412, 424, 438, 503, 504, 561, 565
Beloved Wilkes' Charity, *Re*, 470
Bender *v.* Bender, 65
Bendheim *v.* Morrow, 134, 654
Benedict, Matter of, 183
Benedict *v.* Arnoux, 512, 545
Benedict *v.* Webb, 280, 408, 569, 570, 625, 628
Bennet *v.* Rosenthal, 442
Bennett *v.* Garlock, 93, 94, 98, 115, 247, 286, 292, 343
Bennett *v.* Goble, 210, 285
Benson, Matter of, 303, 341, 409
Bergen *v.* Bennett, 425
Bergen *v.* Valentine, 314, 329
Berger *v.* Duff, 477, 525
Berly *v.* Taylor, 255
Bernstein, Matter of, 238, 527
Berry, Matter of, 367
Bertholf *v.* O'Reilly, 346
Berwick *v.* Halsey, 172
Betts *v.* Betts, 18, 100, 223, 227, 318, 322, 327, 342, 345, 354, 410, 469, 494, 509, 556, 603
Bevan *v.* Cooper, 468, 483, 641
Bevier, Matter of, 230, 239
Beyea, Matter of, 618
Bick *v.* Murphy, 195
Bickerton *v.* Jaques, 50
Bidwell *v.* Greenshield, 308, 321
Bierbaum, Matter of, 469, 487
Bigelow *v.* Tilden, 681
Bijur *v.* Bijur, 559
Billar *v.* Loundes, 7, 17
Bingham, Matter of, 165, 445, 480, 483, 517
Bingham *v.* Jones, 107, 490
Bingham *v.* Marine Nat. Bank, 114, 580
Binsse *v.* Paige, 235
Bird *v.* Merklee, 254, 387, 391
Bird *v.* Pickford, 560
Birley *v.* Birley, 549
Bishop *v.* Bishop, 285
Bissing *v.* Smith, 519
Black, Matter of, 310
Blake *v.* Blake, 224, 321
Blakeley *v.* Calder, 449
Blakeney, Matter of, 226
Blanchard *v.* Blanchard, 450, 504, 561, 564, 649
Blanck, Matter of, 143, 367
Blauvelt, Matter of, 459, 475, 485, 487, 489
Blauvelt, Matter of, 146, 148, 151
Blewitt *v.* Boorum, 43
Blewitt *v.* Olin, 123
Bliss *v.* Fosdick, 40, 137, 654
Bliss *v.* Johnson, 433, 473
Bliss *v.* Olmstead, 321
Bliss *v.* West, 21, 42, 55, 104, 357, 587
Bliven *v.* Robinson, 182
Bliven *v.* Seymour, 26, 109, 258

References are to pages.

Bloodgood *v.* Bruen, 485
Bloomer *v.* Bloomer, 629
Bloomer *v.* Waldron, 512
Bloomfield *v.* Ketcham, 446
Blunt *v.* Syms, 233
Board of Missions *v.* Scovell, 641
Bockes *v.* Hathorn, 119, 204
Bodine *v.* Edwards, 9
Boerum *v.* Schenck, 121, 139, 181, 494
Boese *v.* King, 284, 286
Bogart *v.* Van Velsor, 146, 147, 151
Bogert *v.* Hertell, 157, 492, 556, 559
Bolin, Matter of, 47
Bolton, Matter of, 138
Bolton, Matter of, 484, 485
Bolton *v.* De Peyster, 538
Bolton *v.* Jacks, 298, 299, 626
Bonilla *v.* Mestre, 111, 635
Bonnet, Matter of, 408
Bool *v.* Mix, 20
Boone *v.* Citizens' Sav. Bank, 47, 82
Booth *v.* Ammerman, 321, 332, 329
Booth *v.* Bapt. Church, 37, 250, 384, 409, 561
Bork *v.* Martin, 9, 33
Borst *v.* Corey, 123
Boscowitz *v.* Held, 544, 545, 597
Bostwick, Matter of, 367
Bostwick *v.* Atkins, 139
Bostwick *v.* Beach, 511, 552, 603
Bostwick *v.* Brown, 206
Bostwick *v.* Burnett, 286
Boughton *v.* Flint, 612
Boulle *v.* Tompkins, 183
Bouton *v.* Thomas, 99, 439
Bowden, *In re*, 622
Bowditch *v.* Ayrault, 496, 497
Bowdoin College *v.* Merritt, 116, 119
Bowers *v.* Smith, 636, 637, 638
Bowker *v.* Wells, 17
Bowman *v.* Tallman, 126, 128
Boyd, Matter of, 447
Boyd *v.* Schlessinger, 511
Boyle *v.* St. John, 199
Boynton *v.* Hoyt, 295
Boynton *v.* Laddy, 128
Boyse, *In re*, 405
Bradford *v.* Mogk, 452
Bradhurst *v.* Bradhurst, 381
Bradley, Matter of, 171, 234
Bradley *v.* Amidon, 360, 362
Bradstreet *v.* Clarke, 512
Braman *v.* Bingham, 43
Bramhall *v.* Ferris, 136, 410, 559, 587, 650
Brater *v.* Hopper, 83
Bratt, Matter of, 366

References are to pages.

Braunsdorf, Matter of, 321, 368
Brautigam *v.* Escher, 233
Bremer *v.* Penniman, 406
Brennan *v.* Hall, 31
Brennan *v.* Lane, 183, 605
Brennan *v.* Willson, 124, 237, 238
Breton's Estate, *In re*, 62
Brevoort *v.* Grace, 132, 346
Brevoort *v* Brevoort, 449
Brewer, Matter of, 321, 357, 416, 605
Brewer *v.* Brewer (see Bremer *v.* Penniman)
Brewster *v.* Power, 9
Brewster *v.* Striker, 24, 100
Briggs *v.* Davis, 104, 133, 247, 287, 289, 545
Bright *v.* Boyd, 328
Brill *v.* Tuttle, 52
Brill *v.* Wright, 483
Brimblecom *v.* Haven, 320
Brink *v.* Gould, 41
Brink *v.* Layton, 267, 558, 603
Brink *v.* Masterson, 559
Brittin *v.* Phillips, 605
Bromley *v.* Mitchell, 114
Bronson, Matter of, 270
Brooke *v.* Chappell, 406
Brookman *v.* Kurzman, 644
Brown, Matter of, 485
Brown, Matter of, 191
Brown *v.* Blackman, 52
Brown *v.* Brown, 47
Brown *v.* Cherry, 9
Brown *v.* Clark, 37
Brown *v.* Decker, 117
Brown *v.* F. L. & T. Co., 461, 652
Brown *v.* Harris, 267
Brown *v.* Knapp, 177, 603
Brown *v.* Richter, 624
Browne *v.* Amyot, 340
Browne *v.* Perris, 105
Browning *v.* Hart, 232
Bruce *v.* Lorillard, 220, 222
Bruen *v.* Gillet, 178, 195, 196, 197
Brundage *v.* Brundage, 207, 316
Bruner *v.* Meigs, 498, 570
Brush *v.* Smith, 219
Bryan *v.* Knickerbacker, 295, 297
Bryant, *In re*, 470
Bryant *v.* Thompson, 137, 410, 411
Buchan v. Rintoul, 164, 166
Buchanan *v.* Tebbetts, 564.
Buckingham *v.* Clark, 406
Buckland *v.* Gallup, 206
Buckley *v.* Buckley, 99
Bucklin *v.* Bucklin, 57, 66, 82, 307
Budd *v.* Munroe, 202
Budd *v.* Walker, 36

References are to pages.

Buffalo Cement Co. *v.* McNaughton, 267
Buffalo L. T. & S. D. Co. *v.* Leonard, 654
Bulkley *v.* Depeyster, 81
Bull, Matter of, 321
Bullard *v.* Benson, 341
Bullis *v.* Montgomery, 104
Bump *v.* Pratt, 40
Bunce *v.* Vander Grift, 500
Bundy *v.* Bundy, 75, 155, 362, 380, 444, 461, 465
Bunn *v.* Vaughan, 81
Bunn *v.* Winthrop, 44
Bunnell *v.* Gardner, 582, 583, 595
Bunner *v.* Storm, 526, 527
Burke, Matter of, 73
Burns *v.* Allen, 626
Burrill *v.* Boardman, 73
Burrill *v.* Sheil, 236
Burritt *v.* Silliman, 80, 235, 236
Burtis *v.* Doughty, 250
Bushnell *v.* Drinker, 146, 257
Busk *v.* Aldam, 522
Butler, Matter of, 146, 179, 232
Butler *v.* B. & A. R. R. Co., 205
Butler *v.* Duprat, 308
Butler *v.* Green, 105, 559, 629, 635
Butler *v.* Jarvis, 211
Butler *v.* Johnson, 135, 260, 515, 601, 615
Butler *v.* State M. L. A. Co., 50, 82, 105, 267, 307
Butler *v.* Trustees, 394
Butterfield, Matter of, 77, 563, 623, 626
Byrnes, Matter of, 107
Byrnes *v.* Baer, 25, 435, 445, 539

Caccavo *v.* R. W. & O. R. Co., 210
Cady, Matter of, 242
Cager, Matter of, 455, 462
Cahill *v.* Brennan, 437
Cahill *v.* Russell, 435, 436, 483, 485
Cairns *v.* Chabert, 321, 322
Cairns *v.* Chaubert, 222, 328
Calhoun *v.* Millard, 615
Cambreleng *v.* Graham, 40
Cammann *v.* Cammann, 223, 322
Camp, Matter of, 182, 475, 613, 618
Campbell, Matter of, 640, 641
Campbell *v.* Beaumont, 110, 367, 462, 464
Campbell *v.* Foster, 587, 650
Campbell *v.* Johnston, 138, 447, 494, 511
Campbell *v.* Low, 77, 283, 284, 354, 498, 510, 567
Campbell *v.* Mackie, 228, 234

References are to pages.

Campbell *v.* Purdy, 165
Campbell *v.* Stokes, 496, 497, 498, 499
Campbell *v.* Woodworth, 228
Canfield *v.* Crandall, 559
Cant, Matter of, 151, 153
Card *v.* Meineke, 584
Carey *v.* Brown, 113
Carman, Matter of, 224
Carman *v.* Brown, 559
Carpenter, Matter of, 25, 77, 82, 307, 308
Carpenter *v.* Soule, 42, 52
Carroll *v.* Carroll, 485
Carroll *v.* Conley, 526
Carter *v.* Board of Education, 213, 214, 408
Carver *v.* Richards, 549
Case *v.* Carroll, 138
Case *v.* Towle, 362
Cashman *v.* Wood, 446
Casoni *v.* Jerome, 191
Cass *v.* Cass, 158
Castle *v.* Lewis, 579
Catlin *v.* Trustees of Trinity College, 639
Caufield *v.* Davenport, 40, 50
Caulkins *v.* Bolton, 157
Cavin *v.* Gleason, Matter of, 263, 264
Chadwick *v.* Wilson, 398
Chamberlain *v.* Chamberlain, 558, 632, 633
Chamberlain *v.* Taylor, 433
Chamberlain *v.* Taylor, 99, 291, 441, 444, 557, 558, 600
Chambers *v.* Lancaster, 268
Champlin *v.* Haight, 97, 285
Champney *v.* Blanchard, 50
Chapin *v.* Shafer, 20
Chapin *v.* Thompson, 289
Chapin *v.* Weed, 138
Chapman *v.* Cowenhoven, 449
Chapman *v.* Porter, 56
Chase, Matter of, 73, 476
Chatfield *v.* Hewlett, 234
Chauncey, Matter of, 361, 364, 365, 366, 383
Chester *v.* Jumel, 134
Chesterman *v.* Eyland, 18
Children's Aid Soc'y *v.* Loveridge, 73
Chipman *v.* Montgomery, 625, 636, 638
Chism *v.* Keith, 93
Christie, Matter of (see Matter of Butterfield)
Christy *v.* Libby, 158
Church *v.* Howard, 104, 105

References are to pages.

Church *v.* Ruland, 405
Church of Redemption *v.* Grace Church, 391
Churchill *v.* Churchill, 567
Cnwatal *v.* Schreiner, 285, 501, 645, 646
City of Rochester, Matter of, 411, 480, 483, 559, 571
Clapp *v* Astor, 317, 318
Clapp *v.* Byrnes, 401, 406, 507, 601
Clapp *v.* Clapp, 219
Clapp *v* Clapp, 183
Clark, Matter of, 90, 107
Clark, Matter of, 166
Clark, Matter of, 314, 524
Clark, Matter of, 45, 177
Clark *v.* Clark, 108, 112, 290, 383
Clark *v.* Clark, 196, 3.0
Clark *v.* Crego, 85, 441, 472
Clark *v.* Flint & P. M. R. Co., 141
Clark *v.* Fosdick, 114
Clarke, Matter of, 130, 606
Clarke *v.* Clarke, 321
Clarke *v.* Leupp, 17, 590
Clarkson *v.* Clarkson, 313, 317, 319
Clarkson *v.* De Peyster, 178
Clay *v.* Wood, 17
Clayton *v.* Wardell, 204
Clemens *v.* Clemens, 623, 625
Clift *v.* Moses, 443, 448, 480, 481, 557, 559
Clinch *v.* Eckford, 232
Cline *v.* Sherman, 111, 197
Clinton, Matter of, 220, 226
Close *v.* Shute, 234
Clough *v.* Clough, 40
Cluff *v.* Day, 170, 194, 224, 225
Clulow's Estate, 340
Clute, Matter of, 104
Clute *v.* Bool, 381, 584, 649
Clute *v.* Gould, 208, 218, 223
C. N. Bank *v.* Strauss, 20
Coates *v.* First Nat. Bank, 117
Cochrane *v.* Schell, 16, 26, 275, 278, 304, 361, 369, 370, 372, 373, 374, 375, 378, 381, 382, 383, 624, 637, 643, 646, 649, 650
Cochrane *v.* Walker, 341, 365
Cockcroft *v.* Sutcliffe, 550
Cocks, Matter of, 198
Cocks *v.* Barlow, 75, 147, 182, 198
Cocks *v.* Haviland, 196, 198, 201
Coffin, Matter of, 18
Cogswell *v.* Cogswell, 316, 320, 322, 324, 327, 332, 333
Cohen *v.* Cohen, 110
Cohn, Matter of, 235
Cohn, Matter of, 142, 241, 242
Coit *v.* Rolston, 95
Colburn *v.* Morton, 139, 213, 544, 545
Cole *v.* Terpenning, 616
Coleman *v.* Beach, 431, 459, 469, 476, 487, 510, 520
Coleman *v.* Hiler, 267
Coleman *v.* Manhattan B. I. Co., 599
Colie *v.* Jamison, 98, 286, 288
Collier *v.* Munn, 231
Collins, Matter of, 91, 384
Collins *v.* Hydorn, 120
Collister *v.* Fassitt, 17, 18
Collyer, Matter of, 48
Collyer, Matter of, 234
Colman *v.* Sarrel, 63
Colt *v.* Heard, 461
Colton *v.* Colton, 17
Colton *v.* Fox, 623, 645
Colton *v.* Graham, 64
Columbus Watch Co. *v.* Hodenpyl, 183
Colvin *v.* Young, 464
Commonwealth F. I. Co., Matter of, 179, 234
Conger *v.* Ring, 485
Conklin, Matter of, 309
Conkling *v.* Davies, 412, 413
Conner, Matter of, 495
Conner *v.* Watson, 603
Conover *v.* Hoffman, 566
Constant *v.* Servoss, 642
Continental Trust Co. *v.* Wetmore, 587, 594
Converse *v.* Sickles, 263
Cook *v.* Barr, 32, 34, 35
Cook *v.* Lowry, 175, 178, 219, 235, 295, 297, 337, 370, 374, 649, 650, 651
Cook *v.* Ryan, 479
Cooke *v.* Meeker, 340, 341
Cooke *v.* Platt, 85, 101, 286, 441, 487, 489, 490, 491, 529
Cooke *v.* State Nat. Bank, 159
Cooper, Matter of, 307
Cooper *v.* Burr, 44
Cooper *v.* Cooper, 550.
Cooper *v.* Whitney, 116
Corley *v.* McElmeel, 600
Corn *v.* Corn, 204
Cornell, Matter of, 135
Cornell *v.* Cornell, 267, 359, 360
Cornes *v.* Wilkin, 468
Correll *v.* Lauterbach, 531, 550, 607
Corse *v.* Corse, 124, 342, 344, 349
Corse *v.* Leggett, 32
Coster *v.* Lorillard, 11, 246, 258, 274, 285, 379, 381, 421, 441, 626
Cottman *v.* Grace, 388, 555

References are to pages.

Cotton *v.* Burkelman, 479, 569
Coutant *v.* Servoss, 397, 512, 513
Covenhoven *v.* Shuler, 328
Cowen *v.* Rinaldo, 350
Cowles *v.* Thompson, 234
Cox *v.* Schermerhorn, 221
Coyne *v.* Weaver, 104
Cozzens, Matter of, 151, 198, 201, 202
Crabb *v.* Young, 146, 169, 244
Crabtree *v.* Bramble, 577
Craig, Matter of, 77
Craig *v.* Craig, 23, 25, 148, 238, 295, 355, 370, 513
Craig *v.* Hone, 274, 582
Craighead *v.* Peterson, 425
Cram *v.* Cram, 327
Crandall *v.* Hoysradt, 590
Crane *v.* Decker, 124
Crane *v.* Powell, 33.
Cranston *v.* Plumb, 105
Craver *v.* Jermain, 131
Crawford, Matter of, 46, 47, 224
Crawshay, *In re*, 549, 550
Crise, Matter of, 21, 35
Crittenden *v.* Fairchild, 441, 444, 503
Crocheron *v.* Jaques, 493
Croft *v.* Williams, 196, 197, 198, 200, 530
Cromwell *v.* Cromwell, 259
Cromwell *v.* Kirk, 321, 322, 325, 326, 332, 336
Crooke *v.* Co. of Kings, 22, 142, 247, 248, 250, 410, 411, 451, 460, 469, 471, 474, 476, 477, 505, 522, 540, 644
Crooked Lake Nav. Co. *v.* Keuka Nav. Co., 513
Cross *v.* L. I. L. & T. Co., 314.
Cross *v.* U. S. Trust Co., 78, 631, 633, 634, 635
Crossman, Matter of, 95, 369, 370, 374, 408, 651
Crouse *v.* Frothingham, 119
Crowe *v.* Brady, 48
Crozier *v.* Bray, 26, 461, 462
Cruger *v.* Cruger, 24, 354
Cruger *v.* Douglas (See Cruger *v.* Cruger)
Cruger *v.* Halliday, 237
Cruger *v.* Jones, 130
Cruger *v.* McLaury, 340
Cruikshank *v.* Home for the Friendless, 407, 408, 606, 651
Cullen *v.* Att'y-Gen., 405
Culross *v.* Gibbons, 239, 412, 626, 641
Cumberland Coal & Iron Co. *v.* Sherman, 181, 598

References are to pages.

Cumming *v.* Williamson, 425, 502, 512
Cummins *v.* Barkalow, 268
Cunningham *v.* Davenport, 47, 49
Currin *v.* Fanning, 72, 641
Curry *v.* Powers, 21, 48, 52, 67
Curtis, Matter of, 96, 523
Curtis *v.* Engel, 584
Curtis *v.* Leavitt, 624
Curtis *v.* Smith, 610
Curtiss, Matter of, 222
Cushman *v.* Family F. Soc'y, 123
Cushman *v.* Horton, 370
Cushman *v.* Thayer Mfg. Co , 45, 59
Cussack *v.* Tweedy, 564, 570
Cuthbert *v.* Babcock, 503
Cuthbert *v.* Chauvet, 135, 379, 414, 419, 606
Cutting *v.* Cutting, 422, 429, 431, 454, 522, 524, 588, 652

DaCosta *v.* Bass, 95
Dammert *v.* Osborn, 161, 257, 394, 630, 631, 633, 634, 635
Dana *v.* Murray, 506, 561, 564, 623
Darling *v.* Rogers, 103, 289, 423, 626
Dartmall, *In re*, 143
Daubeny *v.* Cockburn, 549
David, Estate of, 271
Davies *v.* Davies, 450
Davies *v.* N. Y. Concert Co., 119
Davis, Matter of, 96, 269, 270
Davis *v.* Davis, 48, 613, 618, 620
Davis *v.* Kerr, 198, 200
Davis *v.* Stover, 232
Davis S. M. Co. *v.* Best, 157
Davoue *v.* Fanning, 138, 139
Day *v.* Roth, 29, 37, 56
Deansville Cemetery Ass'n, Matter of, 346
Dearing, Matter of, 242
De Barante *v.* Gott, 64, 554, 559
De Bevoise *v.* Sandford, 138
De Caumont *v.* Bogert, 46
Deckelmann, Matter of, 320, 321, 322, 323, 324, 325, 332, 333, 337
Decker & Tyson *v.* Miller, 204
Decouche *v.* Savetier, 613
Deegan *v.* Wade, 455, 456, 464, 564
Degraw *v.* Clason, 380, 584
Dekay, Matter of, 285
De Kay *v.* Irving, 100, 354, 624
Delafield *v.* Barlow, 440, 450, 500, 558
Delafield *v.* Schuchardt, 148
Delafield *v.* Shipman, 258, 361, 370, 375, 496
De Lamater *v.* McCaskie, 234

References are to pages.

Delaney *v.* McCormack, 85, 488, 553, 554, 652
Delaney v. Van Aulen, 320, 361, 363, 364, 383
Delaplaine, Matter of, 205, 227, 234
Delaware, L. & W. R. R. Co. *v.* Gilbert, 183, 580
Delehanty *v.* St. Vincent's O. A., 500
Delmotte *v.* Taylor, 53
Demarest *v.* Ray, 511
Denike, Matter of, 234
Denike *v.* Harris, 153
Dening *v.* Ware, 64
Denton, Matter of, 307
Denton *v.* Sanford, Matter of, 146, 147
Deobold *v* Oppermann, 151, 175, 191, 193
Depew, Matter of, 226, 230
De Peyster, Matter of, 220, 222, 229
De Peyster *v.* Clendining, 80, 111, 285, 307, 559, 626, 653
De Pierres *v.* Thorn, 616
De Pierris, Matter of, 158
Deraismes *v.* Deraismes, 321
Deraismes *v.* Dunham, 107, 240, 242
De Russy, Matter of, 164
Despard *v.* Churchill, 633
Devisne *v.* Mellish, 501
Devlin, Matter of, 341
Devoe *v.* Van Vranken, 339
Dewey, Matter of, 320
DeWitt *v.* Cooper, 321, 322
Dey Ermand, Matter of, 297, 369
Dias *v.* Brunell's Ex'r, 612
Diehl *v.* Lambart, 449
Diez, Matter of, 66
Dill *v.* Wisner, 15, 206, 207, 425, 435, 437, 483, 484, 638
Dillaye *v.* Com. Bank of Whitehall, 133
Dillaye *v.* Greenough, 23, 100, 101, 252
Dillon *v.* Coppin, 62
Dinley *v.* McCullagh, 21, 47, 53
Dissosway, Matter of, 180
Ditmars *v.* Smith, 76, 255, 268
Diven *v.* Lee, 150
Dixon, Matter of, 239
Dixon *v.* Storm, 196, 342, 503
Dodge *v.* St. John, 135, 192, 606
Dodge *v.* Stevens, 606
Dodge *v.* Stevens, 139
Dodkin *v.* Brunt, 78, 79
Dolan, Matter of, 121, 123
Dominick *v.* Michael, 20
Dominick *v.* Sayre, 466
Donaldson *v.* Donaldson, 59
Donovan *v.* MacDowall, 328
Donovan *v.* Van De Mark, 23, 25, 100
Doolittle *v.* Lewis, 443, 478
Dorland *v.* Dorland, 492, 497, 520
Dorman *v.* Gannon, 612.
Doubleday *v.* Newton, 627
Doud *v.* Holmes, 149, 154
Douglas *v.* Cruger, 27, 95, 130, 182, 379, 414, 416
Douglas *v.* Yost, 233, 234
Douglass *v.* Ferris, 191
Douglass *v.* Hazen, 462
Douglass *v.* Howland, 192
Dow *v.* Dow, 357
Dowd *v.* Tucker, 406
Downer *v.* Church, 15
Downes *v.* Phœnix Bank, 612
Downing *v.* Marshall, 24, 249, 267, 284, 349, 396, 421, 422, 441, 506, 559
Downing *v.* Marshall, 233, 234
Downing *v.* Marshall, 228, 323, 409, 485, 506, 557, 628
Drake *v.* Drake, 472, 501, 643
Drake *v* Green, 142
Drake *v.* Paige, 445, 517, 520
Drake *v.* Pell, 496
Drake *v.* Price, 224
Draper *v.* Harvard College, 635
Draper *v.* Palmer, 299
DuBois *v.* Brown, 172, 641
Dubois *v.* Ray, 280
DuBois *v.* Ray, 259, 646
Duchess of Kingston's Case, 120
Duclos *v.* Benner, 155, 156, 312, 314, 645
Duffy *v.* Duffy, 450
Duffy *v.* Duncan, 233
Duffy *v.* Durant Land Improvement Co , 132
Duffy *v.* Masterson, 35
Duke of Cumberland *v.* Graves, 70, 411, 420
Duncan *v.* Duncan, 638
Duncan *v.* Jaudon, 202, 599
Dunham, Matter of, 190
Dunkel, Matter of, 219, 227
Dunning *v.* Dunning, 159
Dunning *v.* Ocean Nat. Bank, 80, 106, 107, 235, 236, 491, 621
Dupre *v.* Thompson, 37, 103, 401, 626
Durfee *v.* Pomeroy, 280
Durland *v.* Durland, 41, 51
Duryea *v.* Mackey, Index.
Duvall *v.* E. E. L. Church, etc., 290, 291, 352
Duvoll *v.* Wilson, 62, 63

References are to pages.

Dyett *v.* C. T. Co., 285, 378, 419, 423
Dygert *v.* Remerselmider, 55

Eager *v.* Roberts, 219
Eagle *v.* Emmet, 313, 604
Earle *v.* Earle, 75, 106, 107, 174, 186, 200, 201, 412
Easterly *v.* Barber, 103
Ebling *v.* Dreyer, 131
Egerton's Admr's *v.* Conklin, 479, 511, 519
Eisner *v.* Curiel, 440
Elias, Matter of, 243
Elias *v.* Schweyer, 242
Elliott *v.* Horn, 69
Elliott *v.* Lewis, 233
Elwood *v.* Deifendorf, 203
Emans *v.* Hickman, 310
Embree, Matter of, 654
Embury *v.* Conner, 346
Embury *v.* Sheldon, 93, 95, 247, 373
Emens *v.* St. John, 576
Emerson, Matter of, 224
Emerson *v.* Bleakley, 78, 82, 86
Emmons *v* Cairns, 10, 16
Ennis *v.* Brown, 397
Erwin *v.* Loper, 165, 436, 484, 557
Esty *v.* Clark, 501
Ettlinger *v.* P. R. & C. Co., 119, 267
Evans *v.* Jackson, 343
Everett *v.* Everett, 9
Everitt *v.* Everitt, 109, 258, 275, 352, 556, 561

Fagan *v.* Strong, 210
Fairchild *v.* Edson, 251, 254, 255
Fargo *v.* Squiers, 561
Farian *v.* Wiegel, 40
Farmer, *In re*, 30
Farmers' L. & T. Co. *v.* Eno, 490, 511
Farquharson *v.* Nugent, 222
Farrar *v.* McCue, 85, 124, 487, 652
Farwell *v.* Tweddle, 314, 329
Fay *v.* Halloran, 340
Felch *v.* Hooper, 609
Fellows *v* Heermans, 25, 55, 376, 413, 419, 425, 434, 441, 566, 624
Fellows *v.* Longyor, 151, 157, 185, 202
Felt & Bell, Matter of, 207
Fernbacher, Matter of, 110, 244, 641
Fernbacher *v.* Fernbacher, 242, 457, 459, 464

References are to pages.

Ferrin *v.* Myrick, 126, 128
Ferris *v.* Ferris, 153, 242, 243
Ferris *v.* Van Veehten, 263, 264
Ferry *v.* Stephens, 51
Fessenden *v.* Blanchard, 210
Field, Matter of, 132
Field *v.* Field's Ex'rs, 623, 625
Fiester *v.* Shepard, 641
Fincke *v.* Fincke, 142, 342, 365, 504, 558
Finden *v.* Stephens, 233
Fink *v.* Cox, 53, 58, 61
Finley *v.* Bent, 558
Finnern *v.* Hinz, 203
First P. S. of B., Matter of, 388
Fischer *v.* Langbein, 523
Fish, Matter of, 341
Fish *v.* Coster, 237, 489
Fish *v.* Klein, 70
Fisher, Matter of, 310
Fisher, Matter of, 290, 352
Fisher *v.* Banta, 481, 555, 556, 558, 569
Fisher *v.* Fields, 32
Fisher *v.* Fisher, 219, 232
Fisher *v.* Hall, 397
Fisher *v.* Hubbell, 120, 123
Fithian, Matter of, 166, 188
Fitzgerald *v.* Topping, 130, 131
Flagler *v.* Schoeffel, 98, 104
Flagler *v.* Wheeler, 104
Flanagan *v.* Flanagan, 110, 461
Fleck *v.* Rau, 443
Fleet *v.* Durland, 449
Fleet *v.* Simmons, 193, 242, 478
Fleming *v.* Burnham, 526, 527, 601
Flint *v.* Bell, 263, 285, 288, 613
Flood *v.* Cain, 40.
Florence *v.* Sands, 364
Floyd *v.* Carow, 408, 409, 475, 503
Foland *v.* Dayton, 126, 128
Foley, Matter of, 400
Follett *v.* Badeau, 34, 138, 283
Foose *v.* Whitmore, 17, 24
Foote *v.* Bruggerhof, 160, 218
Foote *v.* Bryant, 7, 9, 28, 391
Forbes *v.* Halsey, 138, 139, 544
Ford *v.* Ford, 630
Ford *v.* Knapp, 328
Forman *v.* Whitney, 359, 360
Forster *v.* Hale, 32
Forster *v.* Winfield, 406, 479
Forsyth *v.* Rathbone, 296
Fosdick *v.* Delafield, 78
Fosdick *v.* Town of Hempstead, 68, 252, 253, 390, 391
Foster, Matter of, 151, 172, 176, 182
Foster *v.* Coe, 123, 308
Foster *v.* Elsley, 233

References are to pages.

Fowler *v.* B. S. Bank, 48, 173, 263
Fowler *v.* Butterly, 47, 50
Fowler *v.* Ingersoll, 28
Fowler *v.* Lockwood, 232
Fowler *v.* Mutual L. I. Co., 343, 349
Fox, Matter of, 73, 435, 437, 480, 483, 559
Francis *v.* N. Y. and Brooklyn Elevated R. R. Co., 46
Fraser *v.* Trustees, 556, 557, 644
Frazer, Matter of, 154, 310, 603
Frear *v.* Pugsley, 522, 561
Freeborn *v.* Wagner, 464
Freeman *v.* Freeman, 172, 177, 218, 257
French, Matter of, 641
French *v.* Dauchy, 191
Friedman, Estate of, 604
Fritz *v* Fritz, 449
Frothingham, Matter of, 465, 532
Fuller *v.* Artman, 66
Fuller *v.* Yates, 603
Fulton *v.* Fulton, 44, 45, 50
Fulton *v.* Whitney, 140
Furman *v.* Coe, 175, 360
Furniss *v.* Furniss, 605

Gadd, *In re*, 470
Gage *v.* Gage, 640
Gage *v.* Gage, 9.
Gallagher, Matter of, 67
Gallagher *v.* Crooks, 501
Gallie *v.* Eagle, 450
Gano *v.* McCunn, 442
Gantert, Matter of, 165 435, 436, 437, 466, 468, 471, 480, 481, 482, 483, 484, 628, 637
Gardner, Matter of, 437, 461, 463, 474
Gardner *v.* Ogden, 158, 544
Gardner *v.* Rowe, 30
Garfield *v.* Hatmaker, 7, 9
Garlock *v.* Vandevort, 205, 637, 641
Garner *v.* G. L. I. Co., 50, 413
Garnsey *v.* Mundy, 412
Garnsey *v.* Rogers, 262
Garvey *v.* McDevitt, 442, 506, 563, 564
Garvey *v.* N. Y. Life Ins. & Trust Co., 613
Gasquet *v.* Pollock, 369
Gearns *v.* Bowery S. B., 47
Geissler *v.* Werner, 135, 234, 328
Gelston *v.* Shields, 251, 322, 471, 645
Genet *v.* Beekman, 584, 653
Genet *v.* Foster, 587
Genet *v.* Hunt, 247, 279, 417, 418, 428, 431, 561, 565

References are to pages.

Geoffroy *v.* Gilbert, 50
George, Matter of, 47
Gerard, Matter of, 229
Gerard *v.* McCormick, 202
Germond *v.* Jones, 24, 99, 116, 445, 460
Gerould *v.* Wilson, 191, 192
Gerry, Matter of, 312, 313, 314, 315
Gersen *v.* Rinteln, 23, 95, 247, 520, 559
Getman *v.* McMahon, 461, 463
Geyer *v.* Snyder, 139
Gifford *v.* Corrigan, 14
Gifford *v.* Rising, 210, 249
Gilbert, Matter of, 159
Gilbert, Matter of, 263
Gilbert *v.* Gilbert, 9.
Gilbert *v.* North American Fire Ins. Co., 43
Gilbert *v.* Taylor, 621
Gilchrist *v.* Stevenson, 54, 103, 104, 182, 203, 263, 268
Giles' Estate, 641
Gilles *v.* Stewart, 183
Gillespie, Matter of, 110
Gillespie *v.* Brooks, 152, 176, 219, 332
Gilman *v.* Gilman, 171, 179
Gilman *v.* Gilman, 234
Gilman *v.* Healy, 139
Gilman *v.* Healy, 298, 299
Gilman *v.* McArdle, 11, 13, 14, 37, 101, 102, 249, 309
Gilman *v.* Reddington, 109, 122, 247, 250, 255, 297, 307, 370, 441, 497, 505, 649, 650
Gilman *v.* Tucker, 346
Gilmore *v.* Ham, 613, 617, 618
Girvin *v.* Hickman, 191
Gisborne *v.* Gisborne, 470
G. L. & P. J. R. R. Co. *v.* N. Y. & G. L. R. R. Co., 130, 398
Glacius *v.* Fogel, 165, 198, 436, 484, 489
Gladding *v.* Follett, 469, 605
Glaskin *v.* Sheehy, 163
Gleason, Matter of, 243
Glover *v.* Holley, 162, 232
Goddard *v.* Pomeroy, 251
Goebel *v.* Iffla, 132
Goebel *v.* Wolf, 95, 247, 297, 300, 496, 497, 643
Goetz *v.* Ballou, 454, 464
Goldsmid *v.* Goldsmid, 549
Goldsmith *v.* Goldsmith, 7, 33
Goldsmith *v* Swift, 317, 319
Gomez *v.* Gomez, 344, 345, 348, 349, 522
Goodrich, Matter of, 219

References are to pages.

Goodrich *v.* Russell, 70
Gordon, Matter of, 286
Gott *v.* Cook, 25, 250, 294, 295, 306, 307, 354, 359, 370, 374, 381, 555
Gottberg *v.* U. S. Nat. Bank, 599
Gottsberger *v.* Taylor, 193
Gould *v.* Rutherfurd, 371, 375
Gourley *v.* Campbell, 557, 558, 569
Govin *v.* de Miranda, 29, 35, 37, 39, 67
Graff *v.* Bonnett, 384, 587, 649, 650
Grafing *v.* Heilmann, 48
Graham *v.* De Witt, 77, 559
Graham *v.* Graham, 603
Graham *v.* Livingston, 100, 440, 556
Graham *v.* Read, 559, 638
Graham *v* Van Duzer, 263
Grandin, Matter of, 618
Grandin *v* Hernandez, 42, 64, 66
Grangiac *v.* Arden, 51, 54
Grant *v.* Grant, 366, 371, 375, 559
Graves *v.* Graves, 406
Graves *v.* Waterman, 379
Gray *v.* Barton, 40, 51
Gray *v.* Gray, 603
Gray *v.* Parke, 142
Greason *v.* Keteltas, 343, 344, 348, 349
Green, Matter of, 270, 271
Green *v.* Dikeman, 285
Green *v.* Green, 54, 80, 107
Green *v.* Hart, 50
Green *v* Howard, 501
Green *v.* Winter, 323
Greene, Matter of, 263
Greene *v.* Greene, 22, 26, 74, 75, 80, 627, 645
Greenland *v.* Waddell, 82, 86, 239, 352, 487, 489, 490, 491, 496, 555, 556, 558, 652, 653, 654
Greenwood *v.* Marvin, 308
Greer *v.* Chester, 97, 247, 297, 418, 623
Greer *v.* Greer, 229
Greyston *v.* Clark, 638
Gridley *v.* Gridley, 16
Griffen *v.* Ford, 280, 380
Griffin *v.* Marquardt, 117
Griswold *v.* Griswold, 321, 341
Griswold *v.* Perry, 517, 518, 606
Griswold *v.* Warner, 461
Groshon *v.* Lyon, 158
Gross *v.* Moore, 251, 252, 406, 408
Grout, Matter of, 207, 234
Grout *v.* Van Schoonhoven, 104, 626
Grymes *v.* Hone, 46, 53, 59, 60
Guion *v.* Williams, 268
Gunning *v.* Carman, 332, 333, 336

References are to pages.

Gurney, *In re*, 622
Guy *v.* Langdon, 14
Guyon *v.* Lewis, 536
Gwyer *v.* Gwyer, 95

Haas *v.* Kuhn, 459
Haas *v.* O'Brien, 286
Hackney *v.* Vrooman, 50
Haddow *v.* Lundy, 263
Hagenmeyer, Matter of, 310
Hagerty *v.* Hagerty, 99, 307, 624
Haggerty *v.* Duane, 145
Haight *v.* Brisbin, 190, 469
Haight *v.* Brisbin, 468, 471, 520
Haight *v.* Pine, 444
Haines *v.* Meyer, 191
Hale *v.* Stewart, 289
Hall, Matter of, 77, 239, 442
Hall, Matter of, 198
Hall, Matter of, 49, 54
Hall *v.* Campbell, 225, 232
Hall *v.* Dusenbury, 234
Hall *v.* Erwin, 7
Hall *v.* Hall, 224, 229
Hall *v.* Hall, 70
Hall *v.* McLaughlin, 520
Hall *v.* Richardson, 120
Hallett *v.* Thompson, 582, 584, 650, 653
Halsey *v.* Van Amringe, 234
Halsted *v.* Hyman, 151, 194
Ham *v.* Van Orden, 51, 53, 59, 248, 451, 649
Hamer *v.* Sidway, 24, 38, 262, 307, 613
Hamilton *v.* N. Y. Stock E. B. Co., 531
Hamlin *v.* Osgood, 291
Hammond, Matter of, 112
Hancox *v.* Meeker, 143, 219, 265, 322, 468, 471, 520
Hancox *v.* Wall, 143
Handley *v.* Wrightson, 501
Hannahs *v.* Hannahs, 177
Harbeck, Matter of, 232
Harding *v.* Glynn, 501
Hardt *v.* Levy, 213
Harlow *v.* Mills, 172, 178
Harper *v.* Chatham Nat. Bank, 447, 572, 573, 577
Harrington *v.* Erie County Savings Bank, 139, 598
Harrington *v.* Keteltas, 621
Harris, Matter of, 227
Harris *v.* Am. Bible Soc'y, 404
Harris *v.* Clark, 295, 297, 557, 623, 626
Harris *v.* Clark, 40, 52, 53, 58
Harris *v.* Ely, 354

References are to pages.

Harris *v.* Larkins, 118, 449
Harris *v.* Slaght, 404
Harris *v.* Strodl, 514, 517, 518, 599
Harrison *v.* Clark, 191
Harrison *v.* Clarke, 192
Harrison *v.* Harrison, 250, 255, 258, 259, 290, 625, 626
Harrison *v.* U. T. Co., 243, 511, 651
Hart *v.* Sansom, 609
Hartnett *v.* Wandell, 11, 91, 503
Harty *v.* Doyle, 543
Harvey *v.* Brisbin, 26, 385, 444, 570, 589, 590, 604
Harvey *v.* McDonnell, 119
Harward *v.* Hewlett, 234
Hasbrouck *v.* Blauvelt, 128
Haskin *v.* Teller, 178, 219
Hasler *v.* Hasler, 172, 234
Hatch *v.* Bassett, 266, 383, 411, 555
Hatch *v.* National Bank, 263
Hatfield *v.* Sneden, 604
Hathaway, Matter of, 153
Hathaway *v.* Hathaway, 23, 25
Hauselt *v.* Patterson, 103, 443
Haux *v.* Dry Dock Savings Institution, 21, 48, 49
Havemeyer, Matter of, 148, 150, 242
Havemeyer *v.* Loeb, 234, 286
Havens, Matter of, 641
Havens *v.* Healy, 583
Haviland, Matter of, 364
Haviland *v.* Cocks, 381
Haviland *v.* Willets, 21
Hawley, Matter of, 18, 26, 89, 108, 158, 222
Hawley, Matter of, 120
Hawley *v.* James, 11, 100, 101, 213, 232, 274, 284, 285, 289, 291, 350, 351, 380, 407, 410, 441, 513, 540, 626
Hawley *v.* James, 102
Hawley *v.* James, 630
Hawley *v.* Ross, 81, 83, 84
Hawley *v.* Singer, 222
Haxtun *v.* Corse, 102, 250, 290, 294, 370, 623
Hayden, Matter of, 364, 372
Hayden, Matter of, 223, 226, 229, 231
Hayden *v.* Wellington, 286
Haydock *v.* Stow, 530
Hayes *v.* Kershow, 62
Hayes *v.* Pratt, 204
Haynes *v.* McKee, 654
Haynes *v.* Sherman, 497, 623
Haywood *v.* Townsend, 190
Hazard, Matter of, 166
Heath *v.* Hewitt, 642
Heather's Estate, 234
Hecht, Matter of, 90, 107, 109, 111
Hedges *v.* Riker, 343, 345, 513
Heermans *v.* Burt, 94, 100, 288, 290, 407, 441, 566
Heermans *v.* Ellsworth, 54
Heermans *v.* Robertson, 24, 26, 99, 143, 144, 285, 376, 407, 425, 441, 480, 504
Helck *v.* Reinheimer, 16
Hellenberg *v.* District No. One, &c., 488, 510, 520
Henderson *v.* Henderson, 24, 26, 101, 280, 286, 343, 396, 442, 446, 450, 503, 504, 559, 563, 625
Hendricks *v.* Hendricks, 369
Hendricks *v.* Isaacs, 590
Henly *v.* Fitzgerald, 506
Hennessy *v.* Patterson, 451
Hepburn *v.* Hepburn, 149
Herbert *v.* Herbert, 127
Hermance *v.* Mead, 110
Heroy, Matter of, 482
Herrick, Matter of, 23, 626
Herrick, Matter of, 227
Herrick *v.* Grow, 511
Herrick *v.* Starkweather, 13
Herrington *v.* Robertson, 207
Herriott *v.* Prime, 528, 569
Hesdra, Matter of, 481
Hess *v.* Hess, 579
Hetzel *v.* Barber, 425, 453, 464, 513, 558, 569, 572, 574, 575
Hiles *v.* Fisher, 249
Hill *v.* Heermans, 268, 308, 437
Hill *v.* Hill, 308
Hill *v.* McDonald, 620
Hill *v.* Nelson, 219
Hillen *v.* Iselin, 423, 501, 515, 524, 540, 541, 561
Hills *v.* Peekskill Sav. Bank, 211
Hillyer *v.* Vandewater, 258, 385
Hine *v.* Bowe, 286
Hirsh *v.* Auer, 7, 25, 37, 267, 307
Hitchcock *v.* Linsly, 118
Hitchcock *v.* Peaslee, 110, 252, 253
Hitchcock *v.* Peaslee, 398
Hoag *v.* Hoag, 420
Hoagland *v.* Trask, 125
Hoar *v.* Hoar, 48, 54
Hobson, Matter of, 98, 224, 361, 412
Hobson *v.* Hale, 297, 384, 437, 557, 558, 630, 635
Hodges, *In re*, 470
Hodgman, Matter of, 265, 315
Hoes *v.* Halsey, 234
Hoffman, Matter of, 94, 96
Hoffman *v.* Penn. Hospital, 179
Hogan *v.* Curtin, 366

References are to pages.

Hogan *v.* Kavanaugh, 159
Hoge *v.* Hoge, 405
Hogle *v.* Hogle, 538
Holden, Matter of, 208, 233, 239
Holden *v.* N. Y. & E. Bank, 111, 155, 173
Holden *v.* Strong, 359, 469
Holdrige *v.* Scott, 206
Holland *v.* Alcock, 13, 253, 254, 256, 309, 400. 471, 633, 638
Holland *v.* Brown, 214
Holley *v.* S. G., 177
Hollingsworth *v.* Spaulding, 140
Hollis *v.* Drew Theo. Sem., 269, 634
Holloway *v.* Headington, 61
Holly *v.* Hirsch, 101, 426, 441, 466, 503, 504, 505, 516, 517, 642
Holmes *v.* Gilman, 263, 264
Holmes *v.* Mead, 255, 388, 389, 395, 625, 626, 627, 653
Holmes *v.* Roper, 53, 58
Homestead Bank *v.* Wood, 123
Hone *v.* De Peyster, 206, 207
Hone's Ex'rs *v.* Van Schaick, 500, 506, 540, 603, 624
Hood, Matter of, 173
Hood, Matter of, 107, 170, 225
Hood, Matter of (see Hood *v.* Hood)
Hood, Matter of, 165
Hood *v.* Hallenbeek. 174
Hood *v.* Hayward, 187, 188, 192, 194, 244
Hood *v.* Hood, 165, 168. 169, 187, 191, 194, 436, 485, 555
Hood *v.* Hood, 107, 111, 112, 170, 194, 225
Hood Barrs *v.* Heriot, 379
Hooker *v.* Axford, 406
Hooley *v.* Gieve, 172, 242
Hope *v.* Brewer, 556, 563, 564, 631, 632, 634, 635
Hopkins, Matter of, 227, 228
Hopkins *v.* Kent, 92, 397
Hopkin's Trust, *Re*, 317
Hopper, Matter of, 76
Hopper *v.* Sage, 317
Horn, Matter of, 195
Horndorf *v.* Horndorf, 366
Horton *v.* Cantwell, 97, 248, 303, 369, 636, 640
Horton *v.* McCoy, 559
Hosack *v.* Blunt, 180
Hosack *v.* Rogers, 151, 234
Hosea *v.* Jacobs, 280
Hosford *v.* Merwin, 9
Hotaling *v.* Marsh, 604
Hotchkiss *v* Elting, 100, 523
Houdayer, Matter of, 270
House *v.* Agate, 616
House *v.* House, 322
House *v.* Raymond, 153, 268, 355, 526, 530
Housman, Matter of, 144, 323, 326, 327, 331, 332
Hovenden *v.* Annesley, 620
Hovey *v.* Chisolm, 471
How *v.* Earl Winterton, 622
Howard *v.* Leonard, 582, 592, 593
Howard *v.* Moot, 70
Howe, Matter of, 117
Howe, Matter of, 72, 250
Howell *v.* Mills, 141
Howell *v.* Mills, 449
Howland *v.* Clendenin, 96, 248, 408, 646
Howland *v.* Heekscher, 213
Hoyt, Matter of, 295, 297, 623
Hoyt, Matter of, 128, 650
Hoyt, Matter of, 374
Hoyt, Matter of, 374, 625
Hoyt *v.* Cross, 405
Hoyt *v.* Hilton, 361
Hoyt *v.* Hoyt, 480. 483, 531
Hoyt *v.* Jaekson, 368
Hoyt *v.* Thompson, 600
Hubbard *v.* Gilbert, 9, 494
Hubbard *v.* Hubbard, 644
Hubbell *v.* Medbury, 114, 119, 138, 285, 613. 620, 621
Hubbell *v.* Sibley, 620
Huestis, *In re*, 73
Hughes, Matter of, 635
Hughes *v.* Hughes, 449
Hnish's Charity, *Re*, 550
Hulburt, Matter of, 230, 234
Hull *v.* Hull, 370, 410, 415, 487, 607, 624
Hull *v.* Mitcheson, 635
Hume *v.* Randall, 428, 429, 455, 459
Humfreville, Matter of, 230
Hun, Matter of, 324
Hungerford *v.* Cartwright, 13, 249
Hunt *v.* Rousmanier, 425, 426
Hunter, Matter of, 468, 485
Hunter *v.* Hunter, 54
Hunter *v.* Hunter, 381
Huntington *v.* Gilmore, 53
Hurd *v.* Farmers' L. & T. Co., 308
Hurlburt *v.* Durant, 217, 224, 265
Huss, Matter of, 635
Husted *v.* Cruikshank, 611
Husted *v.* Thomson, 611
Hutchings *v.* Baldwin, 519
Hutchings *v.* Miner, 14
Hutchins *v.* Van Veehten, 29, 32, 33, 34
Hutchinson *v.* Hutchinson, 33

References are to pages.

Hutchison, Matter of, 135, 233
Hutton *v.* Benkard, 27, 422, 537, 538, 651, 652
Hyatt *v.* Aguero, 528
Hyatt *v.* Allen, 317, 318, 319
Hyatt *v.* Clark, 425
Hyde *v.* Kitchen, 49
Hyland *v.* Baxter, 139, 360, 367, 368
Hynes *v.* Alexander, 159

I. & T. N. Bank *v.* Peters, 263
Ingalsbe *v.* Murphy, 161
Ingersoll, Matter of, 17, 403
Ingersoll, Matter of, 232
Ireland *v.* Corse, 228
Ireland *v.* Ireland, 74, 360, 363, 469, 591
Irish *v.* Nutting, 41
Irving *v.* De Kay, 102, 289, 624
Irving *v.* Rankine, 339
Iseman *v.* Myres, 18

Jack *v.* Robie, 206, 207, 233
Jackson, Matter of, 224
Jackson *v.* Atwater, 16
Jackson *v.* Bonchin, 20
Jackson *v.* Edwards, 454, 457, 458, 474, 503
Jackson *v.* Hartwell, 68
Jackson *v.* Hotchkiss, 614
Jackson *v.* Jackson, 549
Jackson *v.* Jansen, 513
Jackson *v.* Sackett, 614
Jackson *v.* Tuttle, 600
Jackson *v.* 23d St. R. Co., 41, 46
Jackson *v.* Wood, 42
Jacob, Matter of, 242
Jacobs, Matter of, 346
Jacot *v.* Emmett, 176
James, Matter of, 53, 61, 62, 63, 66, 110, 318
James, Matter of, 269, 270
James *v.* Beasley, 520, 626
James *v.* Cowing, 171, 308
James *v.* James, 604
Jansen *v.* Cairnes, 623
Janssen *v.* Wemple, 441
Jarvis *v.* Babcock, 25, 355, 356, 400
Jauncey *v.* Rutherford, 77, 285
Jefferys *v.* Jefferys, 61
Jenkins *v.* Young, 443
Jennings *v.* Conboy, 253, 421, 422, 429, 434, 435, 453, 504
Jennings *v.* Jennings, 623
Jervaise *v.* Clark, 343
Jewett *v.* Miller, 138
Johnson *v.* Cornwall, 381
Johnson *v.* Fleet, 7

References are to pages.

Johnson *v.* Lawrence, 107, 183, 217, 224, 641, 642
Johnson *v.* Wallis, 109
Johnson *v.* Williams, 59
Johnston *v.* Smith, 191, 192, 267
Johnston *v.* Spicer, 7, 25, 64
Jones, Matter of, 185, 229, 239
Jones, Matter of, 183, 321, 323
Jones *v.* Butler, 243
Jones *v.* Butler, 161, 243
Jones *v.* Felch, 340
Jones *v.* Hamersley, 640, 643
Jones *v.* Jones, 158, 245, 363, 495, 610, 631
Jones *v.* M. E. Sunday-School, 559
Jones *v.* Newell, 159, 368, 411, 460, 462
Journault *v.* Ferris, 233
Judd *v.* Warner, 150
Judge *v.* O'Connor, 148, 363
Judson *v.* Gibbons, 107

Kahn *v.* Brooklyn Trust Co., 379
Kahn *v.* Chapin, 139
Kane *v.* Astor's Ex'rs, 472, 513, 541
Kane *v.* Bloodgood, 12, 613
Kane *v.* Gott, 103, 274, 354, 359, 381, 555, 626, 649
Kavanagh, Matter of, 642
Kearney *v.* Cruikshank, 339, 383
Kearney *v.* Miss. Soc'y of S. P., 448, 558
Keating *v.* Bruns, 341
Kedian *v.* Hoyt, 126, 139
Kekewich *v.* Manning, 51, 53, 60
Keleman, Matter of, 17, 255, 402, 403, 405
Keller *v.* Ogsbury, 175, 513, 555
Kellett *v.* Rathbun, 177
Kellogg, Matter of, 219, 223, 226
Kelly *v.* Kelly, 437
Kelly *v.* Roberts, 14
Kelly *v.* Scripture, 12
Kelly *v.* West, 191, 479
Kelsey *v.* Cooley, 267
Kelsey *v.* Van Camp, 641
Kendall, Matter of, 327
Kendall *v.* Case, 464
Kennedy, Matter of, 179
Kennedy *v.* Hoy, 583, 623, 626, 627
Kennedy *v.* Porter, 37, 56
Kennedy *v.* Strobel, 52
Kennedy *v.* Town of Palmer, 635
Kenney *v.* Pub. Ad'm, 40
Kent *v.* Church of St. Michael, 122, 419
Kent *v.* Hopkins, 500
Kenworthy, Matter of, 116, 226
Kenyon *v.* See, 606

References are to pages.

Kernochan, Matter of, 316, 317, 318
Kernochan *v.* N. Y. E. R. R. Co., 115
Kernochan *v.* Wilkens, 343, 350
Keteltas, Matter of, 148, 150, 151, 153
Keteltas *v.* Keteltas, 638
Keteltas *v.* Keteltas, 638, 643
Kiah *v.* Grenier, 354
Kibler *v.* Miller, 537
Kick, Matter of, 493
Kilburn *v.* See, 487, 505
Killam *v.* Allen, 381, 626, 627
Kilpatrick *v.* Barron, 496, 575, 576, 601
Kilpatrick *v.* Johnson, 250, 294, 295, 361, 370, 375, 623, 624, 625
Kilpin *v.* Ratley, 269
Kilroy *v.* Wood, 583, 584
Kimball *v.* Chappel, 531
Kimball *v.* Story, 501
Kimberly, Matter of, 259, 650
King *v.* Archbishop of Canterbury, 470
King *v.* Boys, 70
King *v.* Donnelly, 236
King *v.* Mackellar, 148, 612
King *v.* Merchants' Exchange Co., 308
King *v.* Rundle, 295, 297
King *v.* Talbot, 144, 148, 149, 150, 153, 160, 176, 177, 178, 179, 235
King *v.* Townshend, 398
King *v.* Whaley, 267, 398
King's Estate, *In re*, 405, 406
Kingdon, *In re*, 568
Kingsland *v.* Chetwood, 425
Kingsland *v.* Murray, 483, 517
Kingsland *v* Stokes, 291
Kinnan *v.* Guernsey, 588
Kinnier *v.* Rogers, 253, 283, 428, 460, 479, 480, 502
Kip *v.* Hirsh, 116, 285, 287, 410, 420
Kip's Adm'rs *v.* Deniston, 195, 197
Kirby *v.* Turner, 195, 198, 199
Kirk *v.* Kirk, 75, 78, 79
Kirsch *v.* Tozier, 119, 134, 136, 267
Kirwan, *Re*, 549
Kissam *v.* Dierkes, 133, 512, 517, 530, 532
Kitchen *v.* Lowery, 267
Knapp, Matter of, 128
Knapp *v.* Knapp, 503, 524
Knapp *v.* McGowan, 285, 587
Knickerbocker L. I. Co. *v.* Hill, 9, 442
Knight, Matter of, 172
Knight *v.* Lidford, 143, 317
Knight *v.* Weatherwax, 397
Knoch *v.* Funke, 209
Knower *v.* C. N. Bank, 214
Knowlton *v.* Atkins, 37, 93, 497, 643, 646
Knox *v.* Jones, 100, 623, 630, 650, 654
Konvalinka *v.* Schlegel, 439, 603
Kortright *v.* Storminger, 111, 487, 491
Kurtz *v* Smither, 49
Kyle *v.* Kyle, 123

Labatut *v.* Delatour, 344
Lacey *v.* Davis, 148, 149, 151, 198, 201
Lahey *v.* Kortright, 88, 238, 239, 243, 426, 487, 491, 610
Lamb, Matter of, 323
Lamb *v.* Lamb, 408, 643, 646
Lammer *v.* Stoddard, 613
L'Amoureux *v.* Van Rensselaer, 126, 130, 379
Lander *v.* Arno, 120
Landon *v.* Townshend, 120, 121
Landon *v.* Walmuth, 428, 601, 602
Lane *v.* Lewis, 70, 71, 77, 186, 242
Lancy, Matter of, 183, 185
Lang, Matter of, 265
Lang *v.* Ropke, 280, 380
Lang *v.* Wilbraham, 280
Langdon *v.* Astor's Ex'rs, 37
Langworthy *v.* Crissey, 51
Lapham, Matter of, 258, 649
Lawrence, Matter of, 185
Lawrence, Matter of, 314
Lawrence *v.* Cooke, 17
Lawrence *v.* Elliott, 235
Lawrence *v.* Embree, 328
Lawrence *v.* Farmer's L & T. Co., 513
Lawrence *v.* Fox, 14
Lawrence *v.* Harrington, 15
Lawrence *v.* Holden, 321
Lawrence *v.* Lindsay, 376
Lawrence *v.* Lindsey, 209
Lawton *v.* Corlies, 643
Laytin, Matter of, 327, 333
Laytin *v.* Davidson, 217, 224
Leake *v.* Robinson, 496
Leavitt, Est. of, 183, 243
Leavitt *v.* Pell, 423, 438, 474
Leavitt *v.* Wolcott, 641
Leavitt *v.* Yates, 213, 214, 233
Le Blanc, Matter of, 308
Ledrich, Matter of, 139, 380
Lee *v.* Fernie, 549
Lee *v.* Horton, 118
Lee *v.* Simpson, 535

References are to pages.

Lee *v.* Tower, 303, 603, 629
Lefever *v.* Hasbrouck, 151
Le Fevre *v.* Toole, 480
Leggatt, Matter of, 225
Leggett *v.* Dubois, 246
Leggett *v.* Firth, 436, 461, 462
Leggett *v.* G. N. R. Co., 120
Leggett *v.* Hunter, 87, 122, 132, 134, 237, 238, 419, 491, 525, 529, 653
Leggett *v.* Leggett, 641
Leggett *v.* Perkins, 23, 24, 25, 135, 246, 283, 342, 343, 345, 353, 354, 428, 513
Leinkauf, Matter of, 224
Leitch *v.* Wells, 124, 155
Lent, Matter of, 47
Lent *v.* Howard, 171, 228, 231, 414, 444, 446, 447, 481, 556, 557, 558
Leonard *v.* Am. B. H. M. Soc'y, 457, 459
Leonard *v.* Burr, 274, 275
Leonard *v.* C. S. N. Co., 479
Leonhard, Matter of, 263
Lesser *v.* Lesser, 437
Levey *v.* Bull, 587
Levin *v.* Ritz, 50
Levy *v.* Levy, 73, 79, 389, 623, 626, 635
Levy *v.* Levy, 95, 497, 498, 499
Levy's Accounting, 234
Lewis, Matter of, 97, 418
Lewis *v.* Smith, 516, 603
Lewis *v.* Watson, 195
Lichtenberg *v.* Herdtfelder, 446
Lindheim *v.* Manhattan R. Co., 114, 119
Lindo *v.* Murray, 485, 503, 516, 628
Lingke *v.* Wilkinson, 425
Linsly *v.* Bogert, 312
Litzenberger, Matter of, 196
Livingston, Matter of, 22, 170, 243, 498, 642
Livingston *v.* Freeland, 381
Livingston *v.* Gordon, 249, 360
Livingston *v.* Murray, 109, 110, 223, 456, 462, 464, 505
Livingston *v.* Tucker, 303
Locke *v.* F. L & T. Co., 29, 31, 37, 38, 55, 249, 258, 259, 266, 410, 411, 412, 414, 645
Locke *v.* Locke, 593
Locke *v.* Mabbett, 587
Lockman, Matter of, 234
Lockman *v.* Reilly, 108, 112, 116, 263, 479
Lockwood *v.* Lockwood, 341, 367
Lockwood *v.* Mildeberger, 538
Loder *v.* Hatfield, 16, 616, 620
Lofthouse, *In re*, 470
Long *v.* Long, 188, 190, 191
Loop *v.* Northup, 192
Loos *v.* Wilkinson, 213
Lorillard *v.* Coster, 274
Loring *v.* Palmer, 32
Losey *v.* Stanley, 74, 80, 93, 95, 130, 131, 132, 247, 324, 325, 337, 344, 345, 346, 367, 419, 502, 606
Loucks *v.* Johnson, 40, 47
Lounsbury *v.* Purdy, 9
Lowenstein *v.* Flauraud, 27, 28
Lowery *v.* Erskine, 48, 50
Luce *v.* Burchard, 412
Luce *v.* Gray, 134
Luckey, Matter of, 142
Ludington's Petition, 286
Luers *v.* Brunjes, 181
Luhrs *v.* Eimer, 70
Lunt *v.* Lunt, 126
Lydon *v.* Met. El. R. Co., 574
Lyendecker *v.* Eisemann, 230
Lynch, Matter of, 341
Lynch *v.* Loretta, 250
Lynch *v.* M. E. R. Co , 161
Lynch *v.* Patchen, 485
Lyons, Town of, *v.* Chamberlain (see Town of Lyons *v.* Chamberlain)
Lytle *v.* Beveridge, 138

McAllaster *v.* Bailey, 579
McAlpine *v.* Potter, 222, 224, 225, 227
McArthur *v.* Gordon, 32, 354, 359
McArthur *v.* Gordon, 130
McCabe *v.* Fowler, 174, 175, 201
McCabe *v.* O'Connor, 18
McCaffrey, Matter of, 342, 343, 344, 349, 429, 572
McCahill *v.* McCahill, 9, 34
McCann *v.* Randall, 609
McCarter, Matter of, 165, 180, 206, 262
McCarty *v.* Terry, 120, 559, 569
McCartney *v.* Bostwick, 9, 18
Maclay *v.* Robinson, 51
McClouth, Matter of, 641
McClure *v* Woolley, 641
McComb, *Ex parte*, 384
McComb, Matter of, 165, 437, 485, 514, 557
McConnell *v.* McCullough, 115
McCord, Matter of, 232
McCord *v.* Noyes, 50
McCormack *v.* McCormack, 295, 297
McCorn *v.* McCorn, 481, 483
McCready *v.* Farmers' L. & T. Co , 159, 160, 161, 475

References are to pages.

McCready *v.* Metropolitan Life Ins. Co., 435, 511, 516, 570, 627, 628
McDonald *v.* O'Hara, 449, 450, 572, 576
McDonough *v.* Laughlin, 73
McDougal *v.* Gray, 210
McDougall, Matter of, 110
McElroy *v.* Albany Savings Bank, 47
McElroy *v.* Nat. Savings Bank, 47
McEvoy *v.* Appleby, 583, 591, 593, 594
McEwen *v.* Brewster, 379
McGillivray, Matter of, 241, 242, 244
McGowan *v.* McGowan, 381
McGrath *v.* Van Stavoren, 477
McGraw, Matter of, 556
McGregor *v.* McGregor, 71, 242
McGregor *v.* McGregor, 305, 450
McGregor *v.* McGregor, 204
McIlvaine *v.* Kadee, 20
McKee *v.* N. Y. Elevated R. R. Co, 598
McKee *v.* Weeden, 208, 220
McKenzie *v.* Harrison, 42
McKeown *v.* Officer, 404
McLaren, Matter of, 220, 226
McLean *v.* Freeman, 411
McLean *v.* Ladd, 134, 149, 290
McLean *v.* Macdonald, 114, 450
McLean *v.* McLean, 411, 415, 469, 521
McLean *v.* Prentice, 214
McLoskey *v.* Reid, 436
McMahon *v.* Allen, 568
McMahon *v.* Harrison, 241, 242
McMurray *v.* McMurray, 544
McNeil *v.* Tenth National Bank, 45
McPherson *v.* Rollins, 14, 133, 136, 267, 412, 651
McPherson *v.* Smith, 543, 545
McRae *v.* McRae, 152
McSorley *v.* McSorley's Ex'rs, 213
McSorley *v.* Wilson, 381, 623, 625
Mabie *v.* Bailey, 47
Macaulay *v.* Palmer, 614
Macdonald, Matter of, 148, 150, 201
Mack *v.* Kitsell, 123
Mack *v.* Mack, 50
Mack *v.* M. & F. Sav. Bank, 47
Mackay *v.* Dennington, 320
Mackechnie *v.* Majoribanks, 548
Macomber *v.* Bank of Batavia, 102, 361, 591
Macy *v.* Williams, 47
Magill *v.* McMillan, 93
Mahan, Matter of, 497
Mairs, Matter of, 172
Maitland *v.* Baldwin, 522
Manahan *v.* Gibbons, 197
Mander *v.* Low, 580
Mandeville *v.* Reynolds, 181
Manice, Matter of, 219
Manice *v.* Manice, 24, 93, 95, 100, 250, 255, 294, 295, 296, 297, 306, 371, 374, 375, 376, 410, 442, 468, 502, 503, 625, 626, 631, 633, 653, 654
Manier *v.* Phelps, 513
Mann *v.* Lawrence, 127, 225
Mann *v.* Whitbeck, 26
Manning *v.* Evans, 587
Manning *v.* Manning, 215
Mapes *v.* American Home Missionary Soc'y, 635
Mapes *v.* Tyler, 493
Markey *v.* Markey, 268
Marie *v.* Garrison, 37
Marquis Camden *v.* Murray, 470
Marsden's Trust, *In re*, 549, 550
Marsh *v.* Wheeler, 555, 556, 558
Marshall *v* Lovelass, 70
Marshall *v.* Moseley (see Moseley *v.* Marshall), 337, 338, 339
Marshall *v.* Wysong, 229
Martens, Matter of, 220, 327
Martin *v.* Funk, 14, 40, 47, 56
Martin *v.* Pine, 37, 96, 519, 628
Martin *v.* Platt, 126
Marvel *v.* Stone, 401
Marvin, Matter of, 209
Marvin *v.* Marvin, 9
Marvin *v.* Smith, 411, 534
Marx *v.* McGlynn, 23, 25, 70, 246, 354
Mason, Matter of, 111, 217, 219, 220, 222, 224, 228, 322, 329
Mason *v.* Jones, 259, 358
Mason *v.* Jones, 362
Mason *v.* Mason's Ex'rs, 250, 362, 381, 469
Mason *v.* Mason's Ex'rs, 294, 295, 296
Mason *v.* Pomeroy, 114
Massie *v.* Watts, 158
Masterson *v.* Townshend, 383
Matson *v.* Abbey, 44, 50, 53, 54, 267, 621
Matteson *v.* Armstrong, 93, 101, 102, 303, 468
Matthewson, Matter of, 219
Maxwell, Matter of, 172
Mayer *v.* Hazard, 233, 234
Mayer *v.* Hellman, 286
Mayer *v.* McCune, 512
Mayor of N. Y. *v.* Stuyvesant, 477
Meacham *v.* Sternes, 216, 224

References are to pages.

Mead *v.* Mitchell, 475
Mead *v.* Willoughby, 234
Meakings *v.* Cromwell, 246, 423, 492, 493, 559
Mechanic's Bank, Matter of, 242, 267
Meek v. Devenish, 573
Meeker *v.* Crawford, 153, 232
Meiggs *v.* Meiggs, 25, 54
Mellen *v.* Banning, 449, 450
Mellen *v.* Mellen, 449, 523, 572, 576, 601, 637, 639
Mercantile Deposit Co. *v.* Huntington, 42, 43, 53
Merchant *v.* Merchant, 40
Merino *v.* Munoz, 612
Merriam, Matter of, 640
Merrill *v.* F. L. & T. Co , 308
Merriman *v.* Utica B. L. S. R. Co., 445
Merritt *v.* Bartholick, 50
Merritt *v.* Seaman, 125
Merritt *v.* Scott, 287
Meserole, Matter of, 219
Meserole *v.* Meserole, 280
Messenger *v.* Casey, 516
Metcalfe, Matter of, 641
Mickles *v.* Dillaye, 328
Millard *v.* Clark, 48, 49
Miller, Matter of, 321, 325, 332
Miller, Matter of, 616
Miller *v.* Crawford, 339, 340
Miller *v.* Emans, 352
Miller *v.* Gilbert, 496, 498
Miller *v.* Knox, 268
Miller *v.* Macomb, 250
Miller *v.* Miller, 592
Miller *v.* Smith's Ex'rs, 614
Miller *v.* Wright, 444, 450, 498, 504, 557
Mills *v.* Forbes, 211
Mills *v.* Hoffman, 160
Mills *v.* Husson, 258, 384, 649, 650, 651
Mills *v.* Mills, 233
Mills *v.* Mills, 613
Mills *v.* Smith, 168, 257, 264, 265
Millspaugh *v.* Van Zandt, 520
Milroy *v.* Lord, 54
Miner, Matter of, 408
Miner *v.* Beekman, 328, 617, 618
Minturn, Matter of, 384
Minuse *v.* Cox, 519
Mitchell *v.* Knapp, 367
M. L. Ins. Co. *v.* Woods, 518, 526
Moffat, Matter of, 222
Moffat *v.* Herman, 180
Moir *v.* Brown, 54, 124, 236
Moke *v.* Norrie, 75
Monarque *v.* Monarque, 122, 636, 637
Moncrief *v.* Ross, 447, 555
Monell *v.* Monell, 197
Monroe, Matter of, 140
Monson *v.* N. Y. S. & T. Co., 155, 156, 312
Montfort *v.* Montfort, 185
Montignani *v.* Blade, 41, 279
Mooers *v.* White, 70
Moore *v.* Am. L. & T. Co., 599, 601
Moore *v.* Appleby, 93, 120, 497
Moore *v.* Hegeman, 354, 643
Moore *v.* Moore, 506
Moorhouse *v.* Hutchinson, 244, 262
Morey, Matter of, 211
Morgan, Matter of, 270
Morgan *v.* Hannas, 219
Morgan *v.* Masterson, 627
Morgan *v.* Morgan, 242, 243
Morgan *v.* Morgan, 177, 178, 219
Morgan *v.* Von Kohnstamm, 587
Morgenstern, Matter of, 640
Morian, Matter of, 90
Morris, Matter of, 180
Morris, Matter of, 130, 132, 321, 325
Morris *v.* Lindauer, 116
Morse *v.* Morse, 23, 24, 26, 100, 436, 449, 559, 576
Mortimer *v.* M. R. Co., 115
Morton *v.* Morton, 435, 649
Moseley *v.* Marshall (see Marshall *v.* Moseley), 322, 340
Moss *v.* Cohen, 192
Moss *v.* Cooper, 406
Mott *v.* Ackerman, 248, 352, 397, 489, 490, 491, 510, 520, 537, 561, 644, 651
Mott *v.* Richtmyer, 356, 399
Moulton *v.* de ma Carty, 595
Mount, Matter of, 224
Mowatt *v.* Carow, 500
Moyer *v.* Moyer, 7
Mullarky *v.* Sullivan, 643
Muller, Matter of, 367, 368
Mullon, Matter of, 183
Mulry *v.* Mulry, 74, 75, 80, 81, 607
Mundy *v.* Munson, 603
Munro *v.* Allaire, 114
Munson *v.* S. G. & C. R. R. Co., 138
Murphy, Matter of, 109
Murphy *v.* Briggs, 214
Murphy *v.* Whitney, 278, 279, 649
Murray *v.* Charlick, 623
Murray *v.* Coster, 613, 615
Mutual L. I. Co. *v.* Schwaner, 120
Mut. Life Ins. Co. of N. Y. *v.* Shipman, 422, 503, 516

References are to pages.

Mut. Life Ins. Co. of N. Y. *v.* Shipman, 534, 536
Myers, Matter of, 151, 170, 175, 201
Myers *v.* Bolton, 485
Myers *v.* Mut. L. I. Co., 536
Mygatt *v.* Wilcox, 126, 234
Mygatt *v.* Willcox, 234

Nanz *v.* Oakley, 196, 199
Nathan *v.* Hendricks, 499
Nat. Bank *v.* Levy, 446
Nat. Bank of Newburgh *v.* Bigler, 183, 184
Nat. B. & D. Bank *v.* Hubbell, 214
Naylor *v.* Gale, 219
Nearpass *v.* Newman, 27, 267
Neilley, Matter of, 613, 615
Neilley *v.* Neilley, 123
Nellis *v.* Nellis, 451
Nelson *v.* Cowing, 653
Nesmith, Matter of, 172, 176, 282, 303, 304
New *v.* Nicoll, 127
Newcomb *v.* Ketcltas, 344
Newen, *In re*, 91
New England Trust Co. *v.* Eaton, 315
Newland, Matter of, 226
New Orleans *v.* Gaines's Adm'r, 116
Newton *v.* Bronson, 158, 477, 511, 530, 610
Newton *v.* Porter, 263
Nicoll *v.* Walworth, 93, 410
Niles, Matter of, 201, 202
Niles *v.* Stevens, 526
Niver *v.* Crane, 9
Norling *v.* Allee, 115
Norton *v.* Mallory, 7
Noyes *v.* Blakeman, 126, 127. 379, 584
Noyes *v.* Turnbull, 183
N. T. Bank *v.* Wetmore, 119, 120, 586, 636
N. Y. Dry Dock Co. *v.* Stillman, 398
N. Y. L. Ins. & T. Co. *v.* Livingston, 538, 652
N. Y. & N. H. R. R. Co. *v.* Schuyler, 45
N. Y. & Oswego M. R. R. Co. *v.* Van Horn, 347
N. Y. Steam Co. *v.* Stern, 420

Oakley *v.* Oakley, 227, 360
O'Brien, Matter of, 215
O'Brien *v.* Barkley, 366
O'Brien *v.* Mooney, 97
O'Brien *v.* Weiler, 49
O'Conner *v.* Gifford, 171, 213, 214, 215, 309, 407
O'Connor *v.* Huggins, 479
O'Connor *v.* M. Bank, 257
O'Connor *v.* Waldo, 133
Odd Fellows, &c. *v.* McAllister, 114
Odell, Matter of, 164
Odell, Matter of, 344
Odell, Matter of, 127, 368
Odell *v.* Youngs, 280, 531
O'Donoghue *v.* Boies, 130, 131
Officer *v.* Board of H. M., 492
O'Flynn *v.* Powers, 260, 494, 515
Ogden *v.* Murray, 222, 231
Ogden *v.* Smith, 285, 526
Ogdensburgh Bank *v.* Van Rensselaer, 125.
Ogilvie *v.* Ogilvie, 172
Ogsbury, Matter of, 270, 271
Ogsbury *v.* Ogsbury, 446, 556
O'Hara, Matter of, 7, 147, 243, 252, 254, 402, 403, 404, 405, 406
Oliver *v.* Frisbie, 139, 242, 478, 489
Oliver *v.* Piatt, 263
Olliffe *v.* Wells. 405
Olmsted *v.* Keyes, 50
Onderdonk *v.* Mott, 636
Onderdonk *v.* On erdonk, 625
O'Neil, Matter of, 37
Onondaga T. & D. Co. *v.* Price, 101, 117, 268, 455, 503, 650, 654
Ormiston *v.* Olcott, 147, 195, 196
Orphan Asylum *v.* White, 24
Orr *v.* McGregor, 48
Osborne *v.* McAlpine, 234
Otis, Matter of, 18
Otis *v.* Shants, 115
Ottman & Co. *v.* Cooper, 308
Owens, Matter of, 641
Oxley *v.* Lane, 280, 626, 637

Padgett *v.* Lawrenee, 9
Paff *v* Kinney, 139, 615, 616
Page Jones *v.* Morgan, *In re*, 622
Paget *v.* Stevens, 243
Palmer, Matter of, 268
Palmer *v.* Dunham, 155
Palmer *v.* Horn, 500
Palmer *v.* Marshall, 450
Palmer *v.* Miller, 20
Palmer *v* Phœnix M. L. I. Co., 114
Palms *v.* Palms, 303, 623
Pares *v.* Pares. 550
Paret *v.* Keneally, 491
Parker *v* Foote, 614
Parkhurst *v.* Higgins, 66
Parker *v.* Linden, 481, 554, 557, 558, 572
Parkinson *v.* Parkinson, 321

References are to pages.

Parks *v.* Parks, 103, 352, 354, 355, 410, 624
Paton, Matter of, 491, 492, 645
Patrick, *In re*, 53
Patterson *v.* Ellis, 266
Patterson *v.* Patterson, 310
Patton *v.* Royal Baking Powder Co., 127
Paulding *v.* Marvin, 198
Paulding *v.* Sharkey, 197
Payne *v.* Gardiner, 612
Pearson *v.* Amicable Co., 58
Pease *v.* Egan, 96
Pease *v.* Gillette, 618
Peck *v* Peck, 7
Peck *v.* Sherwood, 164, 247, 266, 325, 326, 330, 331, 335
Pell *v.* Folger, 17
Pendergast *v.* Greenfield, 159, 160, 161, 288
Pendleton *v.* Fay, 202
Penfield *v.* Thayer, 44
Pennington *v.* Gittings, 46
People *v.* Am. L. & T. Co., 263, 599
People *ex rel.* Short *v.* Bacon, 287, 579
People *ex rel.* Day *v.* Barker, 270
People *ex rel.* Gould *v.* Barker, 270
People *ex rel.* Pike *v.* Barker, 116
People *v.* Bd. of Excise, 123
People *v.* Bostwick, 43
People *v.* Chalmers, 192, 284
People *ex rel.* Darrow *v.* Coleman, 270
People *ex rel.* Caswell *v.* Comm'r of Taxes, 203
People *ex rel.* Campbell *v.* Comm'rs of Taxes, 203
People *ex rel.* Leonard *v.* Comm'rs of Taxes, 313
People *ex rel.* Smith *v.* Comm'rs of Taxes, 18
People *v.* Conklin, 70
People *ex rel.* Cornell University *v.* Davenport, 328
People *ex rel.* Collins *v.* Donohue, 74, 119, 191, 192, 615
People *v.* Faulkner, 172
People *v.* Havnor, 346
People *v.* Justices, &c., 123
People *v.* Marshall, 605
People *v.* Merchants' Bank, 598
People *v.* Moores, 69
People *v.* Norton, 78, 140, 185, 192, 243
People *v.* O. B. of S. B. B. Co., 494
People *v.* Powers, 251, 254, 256, 257, 309, 392
People *v.* Prescott, 125
People *v.* Remington, 289
People *v.* Scott, 445, 493
People *v. ex rel.* Adams *v.* Sigel, 124
People *v.* Simonson, 175
People *v.* Stock Brokers' Building Co., 399
People *v.* Townsend, 115
People *v.* Univ. L. Ins. Co., 126
People *v.* Van Buren, 180
Perkins, *In re*, 549
Perkins, Matter of, 641
Perkins *v.* Finnegan, 142
Perkins *v.* Stimmel, 188, 191
Perry, Matter of, 447
Perry *v.* Board of Missions, &c., 127
Persons *v* Snook, 24
Petrie, Matter of, 148
Petrie *v.* P. Ins. Co., 492
Petrie *v.* Petrie, 159, 160, 223, 260, 265
Peyser, Matter of, 177, 233, 235
Pfaler *v.* Raberg, 310
Pfeiffer *v.* Rheinfrank, 98
Pharis *v.* Gere, 18
Phelps' Ex'r *v.* Pond, 22, 280, 370, 380, 400, 558, 624, 632
Phillips *v.* Davies, 435, 520, 531, 644
Phillips *v.* Lockwood, 229.
Phillips *v.* Phillips, 17, 18, 24, 25, 384
Philson *v.* Moore, 105
Phipard *v.* Phipard, 37, 38
Phipps, Matter of, 270
Phœnix *v.* Livingston, 216, 220, 224, 232
Pickles *v.* Pickles, 550
Pickslay *v.* Starr, 21, 52, 53
Pierce *v.* Chamberlain, 341
Pierpont *v.* Patrick, 643
Pierrepont *v.* Edwards, 320, 364
Pierson *v.* Drexel, 21, 308
Pierson *v.* McCurdy, 613
Piffard, Matter of, 509
Pimbe's Case, 70
Pinckney *v.* Pinckney, 321
Pinson *v.* Ivey, 70
Piper *v.* Hoard, 7
Pittman *v.* Johnson, 23, 166, 206
Place, Matter of, 485, 524
Place *v.* Hayward, 117
Platt *v.* Archer, 234
Platt *v.* Mickle, 501
Platt *v.* Moore, 319, 341
Pollock, Matter of, 314, 320, 329
Pollock *v.* Hooley, 443, 478, 489, 505, 536
Pond *v.* Comstock, 214
Pope *v.* Whitcombe, 501
Popham *v.* Spencer, 123
Porter, Matter of, 152, 176

References are to pages.

Portland *v.* Topham, 546, 548, 549, 554
Post, Matter of, 82, 107
Post *v.* Benehley, 139, 451, 544, 618
Post *v.* Hover, 24, 26, 259, 290, 626, 627, 636, 638, 646
Postley *v.* Cheyne, 75
Potter, Matter of, 500
Potter *v.* Dudeney, 572, 574, 577
Potter *v.* McAlpine, 159, 295, 366
Potter *v.* Ogden, 166, 188, 194
Powell *v.* Demming, 205
Power *v.* Cassidy, 253, 254, 390, 391, 466, 471, 524, 557, 558
Power *v.* Hathaway, 612
Power *v.* Speckman, 479
Powers, Matter of, 436, 484, 518
Powers *v.* Bergen, 132, 346, 367
Powers *v.* Powers, 341
Pray *v.* Hegeman, 116, 134, 370, 586, 641
Pray *v.* Hegeman, 261, 295, 298, 370, 376
Prentice *v.* Janssen, 449, 558, 572, 580
Prentiss *v.* Weatherly, 188
Prescott, Matter of, 183
President, &c. *v.* Merritt, 654
Price *v.* Holman, 175, 176, 177, 227
Price *v.* Mulford, 613
Price *v.* Price, 63
Prichard *v.* Thompson, 251, 253, 254, 400
Prindle *v.* Beveridge (see Lytle *v.* Beveridge)
Pritchard *v.* Foulkes, 142
Proctor, Matter of, 314
Provost *v.* Provost, 410
Pruyn, Matter of, 160
Pryor *v.* Pryor, 549
Pullman *v.* Willets, 231, 233
Purdy *v.* Hayt, 280, 444, 626, 641
Purdy *v.* Lynch, 169, 196, 197
Purdy *v.* Wright, 100, 449, 450, 559, 569, 572
Putnam *v.* Ritchie, 328
Putney *v.* Fletcher, 142

Quackenboss *v.* Southwick, 87, 107, 242
Quackenbush *v.* Leonard, 138
Quin, Matter of, 172, 232
Quinn, Matter of, 233
Quinn *v.* Hardenbrook, 539, 646

Radley *v.* Kuhn, 274, 275, 297, 298, 304, 378, 380, 381, 382, 643
Ramsay *v.* DeRemer, 397
Ramsey *v.* Wandell, 425, 437, 642
Randall, Matter of, 139

References are to pages.

Rapalje *v.* Hall (see Rapalje *v.* Norsworthy's Ex'rs)
Rapalje *v.* Norsworthy's Ex'rs, 176, 177
Rathbone *v.* Hooney, 97, 120, 131
Rathbun *v.* Rathbun, 42
Rauchfuss *v.* Rauchfuss, 448, 451, 559
Rawson *v.* Lampman, 397.
Raymond *v.* Rochester Trust, &c. Co., 97, 418
Read *v.* Williams, 251, 252, 253, 254, 524, 557, 638, 640
Reading *v.* Haggin, 158
Reed, Matter of, 605, 654
Reed *v.* Lozier, 103
Reed *v.* Reed, 52
Reed *v.* Underhill, 267, 506, 558
Reeve *v.* Crosby, 73
Reeves, Matter of, 234
Reformed P. D. Church *v.* Brown, 391
Reid *v.* Sprague, 103
Reitz *v.* Reitz, 9, 620
Remington *v.* Walker, 155
Remington *v.* Walker, 159, 162
Reynal *v.* Thebaud, 315, 329, 335
Reynolds *v.* City Nat. Bank, 521
Reynolds *v.* Denslow, 502
Reynolds *v.* Reynolds, 321
Reynolds *v.* Sisson, 138, 175, 177
Rice *v.* Barrett, 297, 623
Rice *v.* Tonnele, 368
Rich *v.* Tiffany, 269, 404, 405
Richards *v.* Crocker, 602
Richards *v.* Moore, 623, 624
Richardson *v.* Richardson, 59
Richardson *v.* Sharpe, 519, 520
Richardson *v.* Thurber, 119
Ridden *v.* Thrall, 40, 46, 47, 53, 60
Rider, Matter of, 105, 545
Rider *v.* Mason, 381, 650
Ridgeley *v.* Johnson, 124
Rieben *v.* Hicks, 161
Riessner & Co. *v.* Cohn, 119
Riggs *v.* Cragg, 312, 315, 641
Riker *v.* Cornwell, 408
Riker *v.* Curtis, 51
Riker *v.* Leo, 388, 644
Riker *v.* St. Luke's Hospital, 16, 17, 402
Riley, Matter of, 360, 362
Riley *v.* Diggs, 448, 559
Ring *v.* McCoun, 398
Risley *v.* Phenix Bank, 52
Roarty *v.* McDermott, 510, 536
Robbins *v.* Robbins, 9, 33
Robert *v.* Corning, 23, 25, 274, 275, 376, 506, 555, 556, 563

References are to pages.

Robert *v.* Morgan, 360
Roberts *v.* Cary, 411, 572, 623
Roberts *v.* Ely, 615
Roberts *v.* Gordon, 577
Roberts & Co *v.* Buckley, 104
Robertson *v.* Sayre, 35, 117
Robins *v.* McClure, 409
Robinson, Matter of, 77, 185, 186, 235, 236, 237, 243, 410
Robinson *v.* Chem. Nat. Bank, 117, 232
Robinson *v.* Harkin, 622
Robison *v.* Robison, 297, 303, 372, 624
Rochester, Matter of City of (see City of Rochester, Matter of).
Roderigas *v.* E. R. S. Inst., 479
Rodman *v.* Fincke, 144, 341, 342, 365
Roe, Matter of, 130, 606
Roe *v.* Vingut, 26, 296, 301, 644, 646
Rogers, Matter of, 167
Rogers *v.* King, 158
Rogers *v.* Ludlow, 584, 588, 624
Rogers *v.* N. Y. & T. L. Co., 7, 23
Rogers *v.* Rogers, 75, 87, 130, 487, 607
Rogers *v.* Rogers, 91, 503
Rogers *v.* Rogers, 204
Rogers *v.* Squires, 193
Rogers *v.* Wendell, 127
Rogers Loco. &c. W'ks *v.* Kelley, 25, 288
Romaine *v.* Chauncey, 593, 594
Roman Catholic O. Asylum *v.* Strain, 47
Rome Exchange Bank *v.* Eames, 286, 624, 638
Roome *v.* Philips, 81, 490, 516, 529
Roos, Matter of, 365, 366, 371
Roosevelt, Matter of, 111, 216, 226
Roosevelt *v.* Land and River Imp. Co., 202, 598
Roosevelt *v.* Roosevelt, 367, 411, 471, 505, 650
Root *v.* Price, 125
Root *v.* Stuyvesant, 285, 540, 626
Roper's Trusts, *In re*, 470
Rorke *v.* McConville, 172
Rose *v.* Hatch, 22, 73, 74, 80, 252, 457, 459, 462, 545
Rose *v.* Rose, 149
Roseboom *v.* Mosher, 527, 528
Roseboom *v.* Roseboom, 26
Rosenburg *v.* Rosenburg, 21, 103, 412, 587, 588
Rosenfield, Matter of, 483
Ross *v.* Roberts, 493, 497, 559
Rothschild *v.* Frank, 193
Royce *v.* Adams, 83, 84, 87, 89, 159, 239, 487, 507, 607, 609
Royer Wheel Co. *v.* Fielding, 286, 291
Rudd *v.* Rudd, 376
Rugg *v.* Rugg, 73
Rumsey, Matter of, 166
Runyan *v.* Mersereau, 50
Ruppel *v.* Schlegel, 640
Ruppert *v.* U. M. I. Co., 50
Russack *v.* Tobias, 76
Russell *v.* Allen, 9
Russell *v.* Russell, 132, 514, 544
Rutherford, Matter of, 181, 203, 368
Ryalls, Matter of, 641
Ryan *v.* Rand, 126
Ryers *v.* Farwell, 103

St. John *v.* McKee, 234
Salmon *v.* Gibbs, 549
Salmon *v.* Stuyvesant, 285
Salsbury *v.* Parsons, 355, 584
Saltus, Matter of, 368
Saltus *v.* Saltus, 368
Sanders *v.* Soutter, 159, 641
Sands, Matter of, 183, 295, 370
Sanford *v.* Goodell, 278
Sanford *v.* Sanford, 47, 52
Sauter *v.* Muller, 367
Savage *v.* Burnham, 23, 103, 258, 280, 285, 291, 555, 556, 603, 625, 626, 627
Savage *v.* Gould, 148
Savage *v.* Olmstead, 360, 361, 605
Savage *v.* Sherman, 160, 219, 234, 600, 642
Sawyer *v.* Cubby, 278, 279, 649
Sayles *v.* Best, 451, 589
Sayre *v.* Townsends, 9
Schaefer *v.* Henkel, 157
Schell, Matter of, 216, 228
Schenck *v.* Dart, 222
Schenck *v.* Ellingwood, 505, 512, 553
Schermerhorn *v.* Cotting, 31, 297
Schettler *v.* Smith, 280, 370, 376, 626, 643
Schierloh *v.* Schierloh, 9
Schlegel *v.* Winckel, 165
Schluter *v.* B. S. Bank, 48, 71
Schmidt *v.* Eiseman, 210
Schmittler *v.* Simon, 126, 174
Schneider, Matter of, 166
Schoener *v.* Lissauer, 617, 618
Scholey *v.* Mumford, 265
Scholle *v.* Scholle, 514, 559, 642, 643
Scholle *v.* Scholle, 141
Schoonhoven *v.* Van Wyck, 313
Schott, Matter of, 174, 202
Schult *v.* Moll, 646

References are to pages.

Schultz *v.* Griffin, 653
Schultze *v.* Mayor, 9
Schutt *v.* Large, 412
Schwab *v.* Cleveland, 115
Schweigert, Matter of, 640
Seofield *v.* Churchill, 191, 193
Scott *v.* Harbeck, 48
Scott *v.* Nevins, 587, 650
Scott *v.* Rand, 104, 133
Scott *v.* Stebbins, 266, 483
Seovel *v.* Roosevelt, 313, 314
Seaman, Matter of, 95, 96, 271, 496, 497
Seaman *v.* Whitehead, 234
Sears, Matter of, 204
Secor *v.* Pendleton, 292
Secor *v.* Sentis, 228, 229
Security L. I. & A. Co., Matter of, 221, 228, 231
Seebeck, Matter of, 343, 496, 497, 503, 504
Seeley *v.* Jago, 572
Selden *v.* Vermilya, 16, 288, 412
Selleck, Matter of, 209, 219
Senior *v.* Ackerman, 192
Seward *v.* Huntington, 260
Shangle *v.* Hallock, 16, 17
Shannon *v.* Pentz, 601
Shannon *v.* Pickell, 516
Sharp, Matter of, 183
Sharp *v.* Pratt, 528
Sharpsteen *v.* Tillou, 513
Shaw *v.* Cordis, 315
Shaw *v.* Lawless, 233
Sheedy *v.* Roach, 40
Sheldon *v.* Chappell, 78
Sheldon *v.* Hoy, 125
Sheldon *v.* Sheldon, 613
Sheldon *v.* Sheldon, 183
Shepard *v.* Gassner, 24, 25
Shepard *v.* Patterson, 179
Sherman *v.* Burnham, 243
Sherman *v.* Parish, 160, 171, 181, 201, 203, 613
Sherry, Matter of, 605
Sherwood *v.* Am. Bible Soc'y, 22
Shields *v.* Klopf, 629
Shields *v.* Sullivan, 234
Shipman, Matter of, 110
Shipman, Matter of, 109
Shipman, Matter of, 163, 166
Shipman *v.* Rollins, 213, 255, 496, 558
Shirley *v.* Fisher, 550
Shook *v.* Goddard, 195
Shook *v.* Shook, 243
Shrader, Matter of, 640
Shumway *v.* Harmon, 559
Shuttleworth *v.* Winter, 53, 176, 178

References are to pages.

Side *v.* Brenneman, 264
Sidenberg *v.* Ely, 322, 324
Siemon *v.* Schurck, 9
Siesel, Matter of, 164
Sillick *v.* Mason, 584, 591, 592, 593, 650
Simmons *v.* Burrell, 388, 638
Simonson *v.* Waller, 366, 631
Simpson *v.* English, 297
Simpson *v.* Moore, 317, 319
Skelton *v.* Scott, 291
Skillman, Matter of, 318
Skinner *v.* Quin, 350, 355, 502
Slack *v.* Wiggin, 181
Slade *v.* Van Veehten, 138
Slatter *v.* Carroll, 635
Sloan *v.* Birdsall, 21, 587, 624
Slocum, Matter of, 361
Sloeum *v.* Barry, 206
Smillie *v.* Quinn, 267
Smith, *In re*, 153
Smith, Matter of, 234
Smith, Matter of, 242
Smith, Matter of, 24, 227, 266, 383, 411
Smith's Estate, 47
Smith *v.* Bowen, 36, 431, 441, 443, 444, 515, 544
Smith *v.* Buchanan, 220, 227
Smith *v.* Campbell, 302
Smith *v.* Central Trust Co., 234
Smith *v.* Central Trust Co., 160
Smith *v.* Chase, 447, 510
Smith *v.* Cornell, 324
Smith *v.* Dresser, 214
Smith *v.* Edwards, 26, 274, 275, 496, 625
Smith *v.* Farmer Typefounding Co., 572, 577, 654
Smith *v.* Felton, 233
Smith *v.* Floyd, 467, 468, 554
Smith *v.* Lawrence, 204
Smith *v.* Murray, 376
Smith *v.* Parsons, 301
Smith *v.* Perine, 14
Smith *v.* Post, 266
Smith *v.* Robertson, 215, 412, 524, 555
Smith *v.* Rockefeller, 177, 205, 605
Smith *v.* Smith, 76, 367
Smith *v.* Smith, 408, 409
Smith *v.* Smith, 145
Smith *v.* Van Ostrand, 109, 110, 462
Smith's Ex'rs *v.* Wyckoff, 381
Smither, Matter of, 52
Sneed *v.* Sneed, 552
Solomons *v.* Kursheedt, 75
Somerset *v.* Earl Poulett, 621, 622
Sortore *v.* Scott, 160, 203, 243

References are to pages.

Sotheran *v.* Denning, 568
Soule, Matter of, 641
Southard *v.* Benner, 137
South Danvers Nat. Bank *v.* Stevens, 41
Sparman *v.* Keim, 20
Spear *v.* Tinkham, 328
Spears, Matter of, 448
Speidel *v.* Henrici, 614
Spelman *v.* Freedman, 288
Spencer *v.* Popham, 172
Spencer *v.* Spencer, 198
Spencer *v.* Strait, 461, 463
Sperb *v.* McCoun, 199
Spicer *v* Raplee, 135
Spies *v.* Boyd, 587
Spofford *v.* Pearsall, 160
Spooner, Matter of, 234
Sproule *v.* Bouche, 317
Stafford, Matter of, 173
Stafford *v.* Roof, 20
Stagg *v.* Beekman, 285
Stagg *v.* Jackson, 165, 485, 556
Stamler's Estate, 376
Standard Sugar Refinery *v.* Dayton, 12
Stanfield, Matter of, 340, 341, 342, 383
Stanton, Matter of, 242, 243
Stanton *v.* King, 118, 127
Stark, Matter of, 146
Starr *v.* Starr, 436, 503, 504, 644
Staunton *v.* Parker, 236
Stearns *v.* Allen, 174
Stehlin *v.* Stehlin, 477
Steinele *v.* Oechsler, 437, 641
Steinhardt *v.* Cunningham, 99, 286, 289, 290
Stephenson *v.* Short, 404
Sterricker *v.* Dickinson, 356
Stevens *v.* Hauser, 599
Stevens *v.* Melcher, 323, 325, 331, 332, 333, 334, 448
Stevens *v.* Miller, 97
Stevens *v.* Stevens, 46
Stevens *v.* Stevens, 448
Stevens *v.* Stevens, 192
Stevens *v.* Stevens, 149
Stevenson, Matter of, 107
Stevenson, Matter of, 164
Stevenson *v.* Lesley, 28, 93, 247, 255, 258, 280, 497
Steves *v.* Weaver, 575, 576
Steward, Matter of, 321
Stewart, Matter of, 503, 522
Stewart *v.* Chambers, 365, 366, 381
Stewart *v.* Hamilton, 435
Stewart *v.* Keating, 522, 538
Stewart *v.* McMartin, 285, 381

References are to pages.

Stewart *v.* O'Donnell, 109
Stewart *v.* Robinson, 183, 184
Stilwell, Matter of, 159
Stilwell *v.* Carpenter, 125
Stilwell *v* Doughty, 325, 336
Stokes *v.* Amerman, 125
Stokes *v.* Weston, 646
Stone *v.* Wood, 536
Storm, Matter of, 196
Storm *v.* Bennett, 132
Stout *v.* Betts, 244
Stout *v.* Rider, 202
Stowell, Matter of, 286
Strang *v.* Strang, 247, 361, 649
Strasburger, Matter of, 18
Straus, Matter of, 286
Straut, Matter of, 114, 119
Strong *v.* Harris, 159
Strong *v.* Wilkin, 474
Stryker *v.* Lynch, 449
Stuart *v.* Kissam, 592
Stuart *v.* Spaulding, 146, 156
Stubbs *v.* Stubbs, 177, 321
Stutzer, Matter of, 381
Stuyvesant, Matter of, 185
Suarez *v.* de Montigny, 133
Suarez *v.* Pumpelly, 477
Sullivan *v.* Remington S. M. Co., 209
Sullivan *v.* Sullivan, 449
Supple *v.* Lowson, 501
Supreme Council *v.* Bennett, 501
Sutherland *v.* Bradner, 102
Sutherland *v.* Brush, 196, 198
Sutherland *v.* Northmore, 521
Sutton, Matter of, 555
Swain *v.* Bringeman, 622
Swaine *v.* Perine, 336
Swan, Matter of, 460
Swan *v.* Produce Bank, 202
Swarthout *v.* Ranier, 457, 462, 523
Sweeney *v.* Warren, 422, 423, 479, 480, 484, 557, 558, 569, 601, 642
Sweet *v.* Geisenhainer, 248
Swett *v* City of Boston, 320
Swift, Matter of, 269
Swift *v.* Wheeler, 210
Syracuse Sav. B'k *v.* Holden, 283, 397, 444, 515, 516

Taber *v.* Willets, 576
Tabor *v.* Brooks, 470
Taft *v.* Marsily, 267
Taggart *v.* Murray, 250, 461, 521
Tallman *v.* Hoey, 53
Tallman *v.* Tallman, 280
Tatham *v.* Vernon, 64
Taylor *v.* Dodd, 480
Taylor *v.* Kavanagh, 654

References are to pages.

Taylor *v.* Kelly, 56
Taylor *v.* Morris, 525, 528
Taylor *v.* Shuit, 196, 198
Tee *v.* Ferris, 406
Teed, Matter of, 269
Tempest *v.* Lord Camoys, 470
Temple *v.* Hawley, 20, 358, 420
Ten Eyck *v.* Witbeck, 36
Terrett *v.* Crombie, 116
Terry *v.* Bale. 48, 584
Terry *v.* Wiggins, 26, 110, 367, 462, 645
Terwilliger *v.* Brown, 138
Terwilliger *v.* Ontario C. & S. R. R. Co., 425
Thacher *v.* Hope Cem. Ass'n, 615
Thatcher *v.* Candee, 123, 236, 237
Thayer *v.* Clark, 191
Thebaud *v.* Schermerhorn, 27, 410, 416, 417
Thomas, Matter of, 234
Thomas *v.* Evans, 321, 323, 325, 326, 328
Thomas *v.* Fuller, 50
Thomas *v.* Pardee, 303
Thomas *v.* Snyder, 537, 539
Thomas *v.* Wolford, 461
Thompson, Matter of, 321
Thompson, Matter of, 365
Thompson *v.* Carmichael's Ex'rs, 570
Thompson *v.* Clendening, 649
Thompson *v.* Conway, 308
Thompson *v.* Hicks. 196, 198
Thompson *v.* Mott, 234
Thompson *v.* Simpson, 549
Thompson *v.* Thompson, 592
Thomson *v.* MacGregor, 191, 193
Thorn *v.* Coles, 555
Thorne *v.* Heard, 622
Thorp *v.* Munro, 103
Thrasher *v.* Bentley, 284, 286
Thurber *v.* Blanck, 579
Tickel *v.* Quinn, 178, 440, 559
Tiemeyer *v.* Turnquist, 286
Tienken, Matter of, 93, 247, 248, 459, 496, 497, 498, 557, 558, 643
Tierney *v.* Wood, 98
Tiers *v.* Tiers, 625, 626, 641
Tietjen, Matter of, 320
Tiffany *v.* Clark, 75, 138
Tilden, Matter of, 220, 228, 229
Tilden, Matter of. 169
Tilden *v.* Dows, 262
Tilden *v.* Fiske, 238
Tilden *v.* Green, 16, 24, 251, 252, 253, 254, 255, 256, 390, 469, 524, 623, 643
Tilford, Matter of, 381

References are to pages.

Tillman *v.* Davis, 557, 558
Tillott, *In re*, 143
Tinkham *v.* Erie Railway Co., 72
Titus *v.* Weeks, 295
Tobias *v.* Ketchum, 23, 27, 100, 603
Tobias *v.* Mayor, 267
Todd *v.* Eighmie, 42, 64
Todd *v.* Monell, 13
Todd *v.* Union Dime Sav. Inst., 64, 66
Todd *v.* Vaughan, 309
Toles *v.* Adee, 620
Tolles *v.* Wood, 379, 582, 583, 586, 591, 593, 594
Tolman *v.* S. B. & N. Y. R. R. Co., 209
Tompkins *v.* Moseman, 77, 89, 185, 186
Toms *v.* Williams, 247, 295, 646
Topham *v.* Portland, 546, 548, 549, 554
Toronto G. T. Co. *v.* C. B. & Q. R. R. Co., 151, 152
Toronto G. T. Co. *v.* C. B. & Q. R. R. Co., 23, 114
Torry *v.* Black, 65
Tousey, Matter of, 82, 83, 86
Towar *v.* Hale, 398
Towler *v.* Towler, 438, 469
Town of Lyons *v.* Chamberlain, 308
Town of Solon *v.* Williamsburgh S. B., 66
Townsend, Matter of, 47
Townsend *v.* Allen, 588. 631
Townsend *v.* Hubbard, 536
Townsend *v.* Mayor, 523
Townsend *v.* Raekham, 14, 15, 43, 134, 267
Townsend *v.* U. S. Trust Co., 314
Townsend *v.* Whitney, 188
Townshend *v.* Frommer, 93, 247, 248, 396, 423, 438, 442, 497, 498, 499
Tracy *v.* Tracy, 9, 33
Trask *v.* Annett, 192
Travis, Matter of, 341, 520
Trist *v* Child, 233
Trow *v.* Shannon, 38, 51
Trowbridge *v.* Horan, 116
Trowbridge *v.* Metcalf, 562, 630
Troy & A. H. R. Co. *v.* Smith, 202
Truax *v.* Slater, 43, 104
Truax *v.* Thorn, 600
Truslow, Matter of. 645
Trust Co. *v.* Hall, 313
Trust & Deposit Co. *v.* Pratt, 191
Trustees *v.* Kellogg, 110, 465
Trustees *v.* Ritch, 404, 405, 406

References are to pages.

Trustees of Phillips Academy *v.* King's Ex'rs, 72
Trustees of Union College *v.* Wheeler, 511
Tucker *v.* Ball, 95, 498
Tucker *v.* McDermott, 177, 207
Tucker *v.* Moreland, 69
Tucker *v.* Tucker, 26, 408, 443, 504, 624
Tugwell *v.* Hooper, 142
Turfler, Matter of, 222
Turner, Matter of, 357
Turner's Settled Estates, 549
Tweddell *v.* N. Y. Life Ins. & Trust Co., 298, 302, 475
Tyson *v.* Blake, 109, 110

Ullman, Matter of, 624, 641
Ulster Co. Sav'gs Inst. *v.* Fourth Nat. Bank, 109
Underhill, Matter of, 167, 265
Underhill, Matter of, 618
Underhill *v.* Dennis, 76
Underhill *v.* Newburger, 232
Underwood *v.* Curtis, 22, 23, 449, 554, 555, 556, 563, 564, 626
Upson *v.* Badeau, 233, 451
Urann *v.* Coates, 32
U. S. Trust Co. *v.* Bixby, 173, 177
U. S. Trust Co. *v.* Black, 643
U. S. Trust Co. *v.* Roche, 116, 130, 132, 337, 498, 580
U. S. Trust Co. *v.* Tobias, 318
Utica Ins. Co. *v.* Lynch, 175, 177

Vail *v.* Vail, 23, 25, 100
Valentine, Matter of, 158, 165, 479, 485
Valentine, Matter of, 379, 586
Valentine, Matter of, 84, 89
Valentine *v.* Belden, 134, 479
Valentine *v* Duryea, 141
Valentine *v.* Schreiber, 129
Valentine *v.* Valentine, 137, 153, 233
Van Alen *v.* Am. Nat. Bank, 263
Van Axte *v.* Fisher, 497, 498, 505
Van Boskerck *v.* Herrick, 466
Van Brunt *v.* Van Brunt, 258, 280, 504
Van Camp *v.* Fowler, 94, 247
Van Camp *v.* Searle, 262, 611
Van Cott *v.* Prentice, 27, 37, 55, 101, 255, 354, 410, 411, 412
Vanderbilt, Matter of, 411, 414, 415, 475, 504
Vanderbilt *v.* Schreyer, 66
Vanderheyden *v.* Vanderheyden, 232
Vanderveer *v.* McKane, 158

References are to pages.

Vandervoort, Matter of, 485, 489, 520, 559
Vandevort, Matter of, 151, 480, 544
Van Emburgh *v.* Ackerman, 371
Van Epps *v.* Van Epps, 34, 36, 140, 242, 267, 379
Van Giessen *v.* Bridgford, 559
Van Heusen *v.* Radcliff, 117
Van Horne *v.* Campbell, 110, 463, 464
Van Kleeck, Matter of, 234
Van Ness, Matter of, 248
Van Riper *v.* Baldwin, 60
Van Schoonhoven, Matter of, 86, 236, 237
Van Schuyver *v.* Mulford, 625, 626, 627
Van Sinderen *v.* Lawrence, 166
Van Slyke *v.* Bush, 127
Van Vechten *v.* Keator, 481, 489, 491, 557
Van Vechten *v.* Pearson, 644
Van Vechten *v.* Van Veghten, 102, 307, 359, 468, 559, 624, 625, 628
Van Vleck *v.* Lounsbery, 313
Van Voorhis *v.* Kelly, 118
Van Wagonen, Matter of, 76
Van Wert, Matter of, 618
Van Wert *v.* Benedict, 537, 538, 567
Van Winkle *v.* Fowler, 435
Van Wyck, Matter of, 87, 527
Van Wyck *v.* Walters (see Van Wyck *v.* Watters)
Van Wyck *v.* Watters, 174, 202
Varnum *v.* Taylor, 183
Vedder, Matter of (see Matter of Clark)
Verdin *v.* Slocum, 24, 355
Vernon *v.* Vernon, 24, 25, 26, 100, 354, 436, 444, 446, 460, 603, 643, 646
Verplanck, Matter of, 258, 641
Vidal *v.* Girard's Ex'rs, 72
Vidvard *v.* Powers, 104
Viele *v.* Keeler, 503
Villers *v.* Beaumont, 63
Vincent *v.* Newhouse, 496, 555
Von Hein *v.* Elkus, 286
Von Hesse *v.* MacKaye, 37, 356, 412, 414
Von Sachs *v.* Kretz, 104, 613
Voorhis *v.* Voorhis, 20

Wachter, Matter of, 41, 44, 54
Wadd *v.* Hazelton, 21, 67
Wade *v.* Holbrook, 43, 53, 104, 268
Wade *v.* Malloy, 322
Wadhams *v.* American Home Miss. Soc'y, 474
Wadsworth, Matter of, 242
Wadsworth *v.* Wadsworth, 70

References are to pages.

Wager *v.* Wager, 644
Wager *v.* Wager, 159, 636, 637, 638, 639
Waggoner *v.* Walrath, 194
Wagner, Matter of, 160, 165, 641
Wagner *v.* Hodge, 121, 285
Wainwright *v.* Low, 77, 355, 356
Wait *v.* Cerqua, 601
Waldron *v.* Sehlang, 520
Walke *v.* Hitcheock, 219
Walker *v.* Downer, 15
Wall *v.* Kellogg's Ex'rs, 490
Wallace *v.* Berdell, 27, 43, 412
Wallace *v.* Castle, 12
Wallace *v.* Payne, 640
Walrath *v.* Handy, 636
Walsh *v.* Sexton, 46, 60
Walter *v.* Maunde, 501
Walton *v.* Howard, 234
Walton *v.* Stewart, 161
Wandesforde *v.* Carriek, 521
Wanguer, Matter of, 558
Ward, Matter of, 48
Ward *v.* Ford, 218, 224
Ward *v.* Ward, 24, 100, 504, 623, 643
Waring, Matter of, 77, 82, 83
Warner *v.* Conn. Mut. L. I. Co., 534
Warner *v.* Durant, 247, 497
Warner *v.* Jaffray, 288
Warren, Matter of, 317
Warren *v.* Leland, 42
Warren-Scharf Paving Co. *v.* Dunn, 263
Warriner *v.* Rogers, 57
Washbon, Matter of, 357
Washbon *v.* Cope, 636, 641
Waterman *v.* Webster, 134, 598, 599
Waters *v.* Collins, 228, 412
Watkins *v.* Reynolds, 410, 498
Watson, Matter of, 640
Watt *v.* Watt, 425
Watts *v.* Shipman, 286, 308
Weaver *v.* Emigrant, &c., Sav. Bank, 48
Webb *v.* Sanford, 520
Weber *v.* Bridgman, 425
Webster *v.* Morris, 247
Weed *v.* Weed, 636, 638
Weekes *v.* Garvey, 207
Weeks, Matter of, 205, 228, 234, 339, 340
Weeks *v.* Cornwell, 100, 291, 409, 644
Weetjen *v.* Vibbard, 119
Weinhaus, Matter of, 234
Welch *v.* Allen, 285
Welling *v.* Welling, 226
Wells, Matter of, 644
Wells *v.* Knight, 109, 321
Wells *v.* Seeley, 461, 559
Wells *v.* Wallace, 81, 84, 172
Wells *v.* Wells, 296
Wells *v.* Wells, 31, 556
Wendell *v.* Wadsworth, 64, 66
Westerfield *v.* Westerfield, 223, 322
Westerlo *v.* De Witt, 40, 49, 50, 60
Western R. R. Co. *v.* Nolan, 118, 119
Westlake *v.* Wheat, 37, 54, 56
Weston, Matter of, 152, 169, 520
Weston *v.* Goodrich, 159, 639
Wetmore *v.* Hegeman, 82
Wetmore *v.* Holsman, 513
Wetmore *v.* Kissam, 20
Wetmore *v.* Parker, 72, 233, 234, 387
Wetmore *v.* Porter, 116, 117, 118, 130, 599
Wetmore *v.* Roberts, 328
Wetmore *v.* Truslow, 75, 380, 582, 650
Wetmore *v.* Wetmore, 582, 584, 591, 592, 595
Wetmore *v.* Wetmore, 594.
Wheat *v.* Rice, 262
Wheate *v* Hall 569
Wheeler *v.* Reynolds, 7
Wheeler *v.* Ruthven, 179
Wheelwright *v.* Rhoades, 137, 321
Wheelwright *v.* Wheelwright, 177, 218
Whitaker *v.* Whitaker, 61, 63
White, Matter of, 644
White *v.* Carpenter, 9
White *v.* Hicks, 534, 535
White *v.* Howard, 251, 557, 629, 630 635
White *v.* Miller, 18, 392
White *v.* Price, 36
Whitehead, Matter of, 89, 90, 185, 186
Whitehead *v.* N. Y. L. Ins. Co., 50
Whitford *v.* Laidler, 174
Whithorne *v.* Harris, 501
Whiting, Matter of, 270, 322
Whitlock *v.* Washburn, 426, 489, 525, 530, 535, 552
Whitney *v.* Martine, 148
Whitney *v.* Phœnix, 159, 177, 201, 314, 498
Whitney *v.* Whitney, 640
Whitson *v.* Whitson, 223, 320, 321, 322, 381, 384
Whittemore *v.* Beekman, 314, 331
Whittlesey *v.* Hoguet, *In re*, 244
Widmayer *v.* Widmayer, 107, 159, 229
Wieting *v.* Bellinger, 410
Wigand *v.* Dejonge, 243
Wiggins, Matter of, 242
Wiggins *v.* Howard, 18
Wilcox *v.* Gilchrist, 82, 251, 252

References are to pages.

Wilcox *v.* Quinby, 321, 322
Wilcox *v.* Quinby, 520
Wild *v.* Bergen, 468, 520
Wilde *v.* Smith, 17
Wilder *v.* Ranney, 124, 321, 525, 526, 558
Wildey *v.* Robinson, 83, 138, 141, 224
Wiley, Matter of, 166
Willets, Matter of, 159, 224, 225, 226, 383
Willets *v.* Titus, 298, 299
Willets *v.* Willets, 16, 17, 403
Williams *v.* Conrad, 626
Williams *v.* Cox, 336
Williams *v.* Fitch, 14, 384, 406
Williams *v.* Freeman, 24, 503
Williams *v.* Freeman, 37
Williams *v.* Guile, 21, 40
Williams *v.* Haddock, 517
Williams *v.* Kiernan, 191
Williams *v.* Montgomery, 279, 352
Williams *v.* Thorn, 582, 591, 593, 594, 650
Williams *v.* Williams, 297
Williamson, Matter of, 321
Williamson *v.* Field, 497, 498
Willis *v.* Sharp, 126, 127, 183
Willis *v.* Sharp, 126, 127, 183
Willis *v.* Sharp, 126, 127
Willis *v.* Smyth, 47
Willson *v.* Law, 15
Willson *v.* Willson, 234
Wilmerding *v.* McKesson, 176, 178, 196, 198, 200, 613
Wilson, Matter of, 73
Wilson *v.* Marion, 214
Wilson *v.* Odell, 295
Wilson *v.* Turner, 470
Wiltsie *v.* Shaw, 16, 483
Winona *v.* St. Paul Co., 70
Winthrop *v.* McKim, 267
Wirt, Matter of, 51, 53
Wise *v.* Murphy, 201, 257
Witzel *v.* Chapin, 25, 48
Woerz *v.* Rademacher, 9, 10, 286, 397, 424, 441, 512
Wolfe, Matter of, 152
Wolfe *v.* Wolfe, 381, 384
Wood *v.* Blodgett, 210
Wood *v.* Brown, 107, 108, 158, 240, 241, 244
Wood *v.* Keyes, 559
Wood *v.* Mitcham, 646
Wood *v.* Seward, 17
Wood *v.* Vandenburgh, 310
Wood *v.* Wood, 147, 149, 155, 356, 379, 503, 603, 632
Wood *v.* Wood, 632
Wood *v.* Wood, 416.

References are to pages.

Wood *v.* Young, 613
Woodgate *v.* Fleet, 249, 627
Woodgate *v.* Fleet, 250, 255, 626, 627
Woodruff, Matter of, 317
Woodruff *v.* Boyden, 140, 172, 268
Woodruff *v.* N. Y., L. E. & W. R. R. Co., 232, 233
Woodward *v.* James, 11, 23, 26, 73, 74, 100, 102, 322, 323, 354, 411, 590
Worden *v.* Worthington, 125.
Worrall *v.* Munn, 43
Worthington, Matter of, 227, 228, 242
Wortman *v.* Robinson, 47, 461
Wright *v.* Douglass, 7, 30, 32, 34, 406
Wright *v.* Dugan, 197, 203
Wright *v.* Miller, 462, 465
Wright *v.* Saddler, 70
Wright *v.* Syracuse, Ontario & N. Y. R. R. Co., 433, 473, 510, 536
Wright *v.* Tallmadge, 474
Wright *v.* Trustees, &c., 557
Wurts *v.* Jenkins, 204
Wyatt, Matter of, 326
Wyckoff *v.* Van Siclen, 177, 196, 620
Wyman *v.* Woodbury, 17
Wynehamer *v.* The People, 346

Yale *v.* Dederer, 379
Yates, Matter of, 109
Yates *v.* Burch, 211
Yates *v.* Lyon, 20
Yates *v.* Yates, 284, 297
Yonkers Savings Bank *v.* Kinsley, 134
York Buildings Association *v.* Mackenzie, 545
Young, Matter of, 95, 496, 497
Young, Matter of, 232, 320, 321, 323, 325, 328, 332
Young *v.* Brush, 232
Young *v.* Heermans, 55
Young *v.* Overbaugh, 58
Young *v.* Purdy, 385
Young *v.* Young, 21, 41, 47, 51, 55, 57, 60, 63, 67
Youngs, Matter of, 234
Youngs *v.* Youngs, 286, 642

Zahrt, Matter of, 603
Zapp *v.* Miller, 321
Zebley *v.* F. L. & T. Co., 614, 618, 620
Zeiter *v.* Bowman, 267
Zilkin *v.* Carhart, 139
Zimmerman *v.* Kinkle, 118, 193, 599
Zouch *v.* Parsons, 69
Zweigle *v.* Hohman, 620

TABLE OF STATUTES CITED.

The references are to pages.

NEW YORK CONSTITUTION.

Art. I., § 6. 419.
" I., § 11. 419.
" I., § 16. 487.
" VI., § 1. 240, 262, 487.
" VI., § 15. 89.

REAL PROPERTY LAW.

§ 1. 28, 29, 257, 394, 419, 423.
§ 2. 19, 68.
§ 3. 19, 433.
§ 4–7. 71.
§ 23. 28.
§ 24. 28.
§ 25. 28.
§ 26. 28.
§ 27. 28, 101, 277, 542.
§ 28. 28, 101.
§ 29. 28.
§ 30. 28, 274, 278.
§ 31. 497, 499, 505, 553.
§ 32. 273, 278, 279, 280, 295, 296, 297, 344, 390.
§ 33. 294.
§ 34. 294.
§ 35. 294.
§ 36. 294.
§ 37. 294.
§ 39. 272, 294.
§ 40. 294.
§ 44. 645.
§ 46. 251, 645.
§ 47. 274.
§ 48. 373
§ 49. 96.
§ 50. 277, 294, 344, 348, 372, 390.
§ 51. 250, 281, 293, 296, 297, 344, 348, 624.
§ 52. 293.
§ 53. 278, 368, 372, 374.
§ 54. 279, 561.
§ 56. 258.
§ 70. 6, 418.
§ 71. 6, 92, 94, 282, 388.
§ 72. 33, 94, 355, 396, 397, 418, 499.
§ 73. 7, 282, 355, 396, 397, 418, 499.
§ 75. 10.

The references are to pages.

§ 76. 7, 100, 230, 282, 283, 286, 289, 292, 304, 342, 344, 347, 348, 351, 385, 393, 395, 441, 443.
§ 77. 99, 100, 351, 390, 438, 439, 442, 443, 528.
§ 78. 581, 582, 585, 592, 594.
§ 79. 390, 434, 438, 441, 442, 443, 627.
§ 80. 92, 117.
§ 81. 96, 247.
§ 82. 97, 248.
§ 83. 97, 182, 248, 275, 374, 385, 418, 582, 585, 586.
§ 84. 377, 580, 598.
§ 85. 131, 275, 337, 346, 347, 374, 377, 598, 606.
§ 86. 345, 346, 347, 348, 606.
§ 87. 129, 606.
§ 88. 133, 598, 601.
§ 89. 272, 410, 498, 569, 650.
§ 90. 272, 287, 420, 569, 650.
§ 91. 77, 81, 83, 117, 170, 186, 188, 410, 478, 487, 529, 553, 606, 607, 609, 652, 653.
§ 92. 71, 87, 88, 238, 240, 243, 410, 478, 487, 529, 553, 608, 609, 651, 653.
§ 93. 257, 392, 400, 478, 606, 635.
§ 110. 6, 422, 424, 652.
§ 111. 390, 424.
§ 112. 425, 476, 525, 553.
§ 113. 427.
§ 114. 427.
§ 115. 427, 428, 502.
§ 116. 427, 428, 429.
§ 117. 427, 430, 444.
§ 118. 427, 430, 467, 502.
§ 119. 433.
§ 120. 425, 434, 561.
§ 121. 473.
§ 122. 473, 502.
§ 123. 473, 475, 502.
§ 124. 438, 476, 579, 580, 585, 597.
§ 125. 414, 458, 502, 566, 578, 579, 580, 585, 588, 597.
§ 126. 477, 502, 553.
§ 127. 444, 580.
§ 128. 412, 476, 504, 566.
§ 129. 454, 455, 457, 458, 461, 463, 585, 588, 652.
§ 130. 455, 457, 458, 459, 460, 461, 585, 588.
§ 131. 455, 457, 461, 585, 588.
§ 132. 455, 457, 458, 461, 585, 588.
§ 133. 454, 455, 457, 461, 585, 588.
§ 134. 454, 461.
§ 135. 475, 553.
§ 136. 475, 502.
§ 137. 466, 467, 468, 469, 471, 542, 543, 553, 554, 642.
§ 138. 468, 494, 495, 502, 548, 553.
§ 139. 468, 553, 579, 588.
§ 140. 468, 472, 476, 478, 495, 502, 542, 543, 553, 554.
§ 141. 468, 476, 478, 492, 554.
§ 142. 468, 476, 553, 584, 588.
§ 143. 468, 550.
§ 144. 580, 585, 588.
§ 145. 508, 568.
§ 146. 524, 527, 529.
§ 147. 508, 539, 552.

The references are to pages.

§ 148. 425, 507, 510, 552.
§ 149. 512, 553.
§ 150. 512, 553.
§ 151. 512, 553.
§ 152. 512.
§ 153. 532.
§ 154. 530.
§ 155. 510, 534, 536.
§ 156. 534, 537, 651.
§ 157. 539.
§ 158 390. 561.
§ 159. 494, 561.
§ 160. 550.
§ 161. 543.
§ 162. 478, 487, 529, 554, 601, 606, 652, 653.
§§ 178–182. 603.
§ 183. 603, 604.
§ 205. 28, 642.
§ 207. 27, 28.
§ 208. 22, 29, 64.
§ 209. 279, 561.
§ 215. 103.
§ 221. 510.
§ 222. 349.
§ 223. 510.
§ 225. 433, 599.
§ 226. 596, 597.
§ 227. 578, 580, 596, 597.
§ 228. 579, 596.
§ 229. 578.
§ 230. 597.
§ 231. 414, 521, 567, 597, 600.
§ 232. 137, 446.
§ 233. 322.
§ 240. 28, 36, 508.
§ 241. 36, 66.
§ 242. 29, 66.
§ 243. 66.
§ 244. 511.
§ 273. 413, 414.
§ 276. 523.
§ 280. 28.
§ 294. 71.
§ 295. 500.
§ 300. 418.

REVISED STATUTES.

1 R. S. 730, § 63. 378, 418, 419.
1 " " 773, § 1. 279, 296, 649.
1 " " 773, § 2. 81, 648, 649.
1 " " 773, § 3. 250, 281, 296, 301, 305, 649.
1 " " 774, § 4. 305, 649.
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2 " " 56, § 1. 19, 20, 476.
2 " " 56, § 5. 435, 539.
2 " " 57, § 4. 69, 71.
2 " " 57, § 5. 651.
2 " " 65, § 49. 401.

The references are to pages.

2 R. S. 109, § 55. 525, 526, 528, 529.
2 " " 110, § 58. 479.
2 " " 135, § 1. 578, 587, 597.
2 " " 135, § 6. 32.
2 " " 137, § 1. 578, 596, 597.
2 " " 137, § 2. 28.
2 " " 137, § 3. 579.

CODE OF CIVIL PROCEDURE.

§ 8. 180, 610.
§ 9. 180.
§ 69. 616.
§ 74. 616.
§ 184. 125.
§ 217. 487.
§ 316. 122.
§ 388. 615, 616, 617, 618, 620.
§ 395. 622.
§ 396. 621.
§ 401. 621.
§ 402. 621.
§ 404. 621.
§ 410. 612.
§ 414. 616.
§ 449. 113, 157.
§ 717. 609.
§ 718. 609.
§ 1241. 610.
§ 1312. 211.
§ 1326. 211.
§ 1343. 211.
§ 1351. 211.
§ 1360. 211.
§ 1473. 492.
§ 1501. 433, 600.
§ 1525. 113.
§ 1533. 449, 654, note.
§ 1772. 593.
§ 1835. 205.
§ 1836. 205.
§ 1843. 572.
§ 1866. 636, 638, 639.
§ 1867. 639.
§ 1871. 578, 581, 587.
§ 1879. 582.
§ 1910. 266.
§ 1916. 492.
§ 2226. 180.
§ 2266–2292. 610.
§ 2284. 180.
§ 2285. 180.
§ 2345. 69, 131, 609.
§ 2346–2347. 69, 609.
§ 2348. 131, 345, 348.
§ 2388. 519.
§ 2463. 587.
§ 2472. 641.
§ 2476. 509.

The references are to pages.

2481.	641.
2511.	76.
2514.	83, 90, 107, 158, 162, 168, 487.
2546.	164.
2553.	187, 188, 189.
2554.	187, 189.
2555.	180, 189, 610.
2557.	208.
2558.	209.
2559.	209.
2560.	209.
2561.	209, 233.
2562	209.
2589.	209.
2599.	209.
2606.	163, 165, 187, 188.
2607.	187.
2608.	188.
2609.	188.
2611.	509.
2612.	70, 240.
2613.	489.
2624.	640.
2638.	240.
2642.	525, 528, 529.
2643.	529, 587.
2692.	479.
2693.	479.
2694.	509.
2695.	478.
2703.	477, 478.
2712.	340, 485, 486.
2720.	338, 340.
2726.	162, 164, 485.
2727.	163, 165.
2728.	162, 163, 164, 165.
2729.	162, 167.
2730.	162, 163, 167, 215, 217, 225, 228, 229.
2731.	162, 167.
2733.	167.
2743.	167.
2744.	167.
2746.	167.
2749.	310, 482.
2749–2801.	468.
2759.	482.
2802.	162, 168, 216, 217.
2802–2820.	166.
2803.	163, 164.
2804.	180.
2805.	180.
2806.	180.
2807.	164, 165.
2808.	165.
2809.	163, 165.
2810.	162, 218.
2811.	163, 164, 167, 218.
2812.	167, 168.
2813.	168.

The references are to pages.

§ 2814.	163, 238.
§ 2815.	90, 185, 241.
§ 2816.	185, 241.
§ 2817.	70, 240, 244.
§ 2818.	85, 86, 88, 89, 90, 185, 244, 410, 487, 609.
§ 2819.	163, 166, 168.
§ 2820.	158.
§ 2932.	162.
§ 3228–3279.	209.
§ 3240.	208, 209.
§ 3246.	205, 209.
§ 3271.	209, 210.
§ 3272.	210.
§ 3279.	211.
§ 3320.	193, 231.
§ 3334.	164.
§ 3347.	209, 211.

PENAL CODE.

§ 129.	433.
§ 130.	433, 473.
§ 131.	433.
§ 164.	66.

SESSION LAWS.

L. 1848, ch. 319.	405.
L. 1858, ch. 314.	137, 446.
L. 1860, ch. 360.	269, 404, 405.
L. 1881, ch. 654.	Index.
L. 1882, ch. 185.	77, 78, 82, 83, 84, 86, 89, 117, 157, 188, 410, 606, 652, 653.
L. 1883, ch. 65.	519.
L. 1889, ch. 65.	148.
L. 1892, ch. 516.	255.
L. 1892, ch. 677.	64, 642.
L. 1892, ch. 687.	72.
L. 1892, ch. 688.	149.
L. 1892, ch. 689.	68, 71, 150, 157, 159, 176, 185, 292, 295, 297, 305
L. 1892, ch. 690.	150.
L. 1893, ch. 452.	97, 418, 585.
L. 1893, ch. 696.	157.
L. 1893, ch. 701.	256, 388, 392, 400, 478, 606, 635.
L. 1894, ch. 448.	642.
L. 1896, ch. 249.	231.
L. 1896, ch. 272.	20, 125, 415, 474.
L. 1896, ch. 572.	36.
L. 1896, ch. 908.	203.
L. 1896, ch. 908.	203.
L. 1896, ch. 908.	322.

ENGLISH STATUTES.

21 Hen. VIII., ch. 4.	528.
27 Hen. VIII., ch. 10.	3.
29 Car. II., ch. 3.	32.
11 Geo. II., ch. 19.	337.
4 & 5 Wm. IV., ch. 22.	338, 339.

Express Trusts and Powers

EXPRESS TRUSTS AND POWERS.

PART I.

CHAPTER I.

INTRODUCTION.

§ 1. **History of uses and trusts.**—In a report submitted to the Legislature of New York, in connection with the draft for the revision of 1830, the revisers explained in the following terms the history of the then existing law of Uses and Trusts, and the system which they proposed as a substitute.

§ 2.—"The severe burthens and numerous restrictions which the feudal law imposed on real property are generally known. It was a system that could flourish only in a barbarous age and under a despotic government. It consulted solely the interests of the monarch and a landed aristocracy; and to maintain their power, the real owners and cultivators of the soil were to be held in military bondage. If a nation was to advance at all in civilization and freedom, it was quite impossible such a system could be perpetuated; and it was to relieve those who were groaning under its oppression, yet had not the means or power of procuring its direct repeal, that uses were first invented.

§ 3.—"An use (as uses existed previous to the Statute of Uses) may be defined a confidence reposed in the owner of lands, that he would permit another person to enjoy the possession, receive the profits, and direct the disposition. It was a device by which, while the formal title remained in one, the whole beneficial interest was vested in another. The success of this invention was, for a long time, doubtful. At an early day the courts of com-

mon law held that uses were invalid; in other words, that the beneficial owner had no estate or right whatever, but that the absolute property discharged from any trust was vested in the person having the legal title. The Court of Chancery, however, was more indulgent. The powers of that court were at that day administered by churchmen, and the interests of the Church in evading the statutes of mortmain required that uses should be favored.

§ 4.—" By the aid of Chancery, therefore, the legal owner was compelled to permit the person entitled to the use to enjoy the possession and profits, and was obliged to execute such conveyances as he might direct. The distinction between legal and equitable estates was thus introduced, and uses, notwithstanding the constant opposition of the courts of law, became firmly established. The advantages of uses, as thus established, in mitigating the evils of the feudal system, were very great. The equitable estate was not liable to forfeiture for treason or felony, nor subject to the feudal burthens of wardship, marriage, etc. The power of disposition in the equitable owner was greatly enlarged, and the feudal restraints on alienation, to a considerable extent, eluded. The equitable owner, although the Statute of Wills was not yet in force, was even enabled to pass his property by devise, since his trustee was always compelled to execute such conveyances as he directed, whether to take effect during his life or after his death.

§ 5.—" On the other hand, uses were attended with many inconveniences, and led to great abuses. They tended to defraud creditors, who had no remedy against the equitable estate, and purchasers, whose conveyances or leases from the equitable owner the trustee could always avoid. They enabled the trustee, by conveying or submitting to a disseisin, and by other means, to defeat the rights of the beneficial owner; and a frequent resort to equity became necessary, to compel him to perform the trust. And, in our judgment, above all, by separating the legal and equitable estate, and introducing two classes of rights over the same lands, governed by different rules, and subject to different jurisdictions, they rendered titles perplexed and obscure, and multiplied litigation.

§ 6.—"To remedy these and other alleged inconveniences, various statutes of partial operation were passed, previous to the statute 27 H. VIII., chap. 10, from which our Statute of Uses was borrowed. The last statute did not contemplate a partial reform, but was meant to reach the evils in its whole extent by abolishing the distinction between the title and the use, and converting, in all cases, the interest of the beneficial owner into a legal estate.

§ 7.—"This, which it is admitted by all was the principal intent of the Legislature, was, however, entirely defeated by the narrow construction of the statute, which the courts of law unfortunately adopted. The statute declared, in substance, that whenever one person is seised to the use [1] of another, the person so entitled to the use should also be entitled to the possession and legal estate; and the judges, adhering to the letter, and overlooking the spirit of the law, decided that where successive uses are contained in a conveyance, it is the first use only which, in technical language, is executed by the statute. Thus, a grant to A, to the use of B, to the use of C, was held to vest the legal estate by force of the statute in B, while C retained the beneficial ownership in the same manner as if the statute had never been passed. In such cases, therefore, the whole effect of the law was to change not the estate, but the trustee.

§ 8.—"The consequences of this rigid construction are generally known and still exist. Uses, under the name of trusts, were immediately revived and extended, and that separation of legal and equitable estates, which it was the main object of the Legislature to prevent, was perpetuated. It must not, however, be supposed that the Statute of Uses was entirely inoperative. It was, in fact, attended with important and durable consequences on the law of real estate. The statute did not abolish existing uses nor prohibit conveyances to uses in future. It only declared that both existing and future uses, as they arose, should become

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[1] The derivation of the technical term "use" from the Latin *ad opus* (Old French *os* or *oes*), and not from *usus*, is fully explained in Pollock and Maitland's "History of English Law," p. 226.

legal estates ; and the effects of thus permitting the creation of uses, were :

" 1. As every deed capable of raising a use was, by force of the statute, rendered also capable of passing the legal estate, new forms of conveyances were introduced by which the title and the possession of lands were transferred without livery of seisin, which, at common law, was indispensable.

" 2. The new modifications of property, which the increasing wants of society demanded, but which the genius of the feudal law forbade, were preserved by retaining uses, to which they owed exclusively their origin.

" It must, therefore, be admitted that the Statute of Uses, although not productive of all the benefits intended, has been, to a considerable extent, salutary in its operation ; but to retain these advantages it is not at all necessary that uses should themselves be retained.

§ 9.—" To uses, even as they now exist, there are strong and, as they seem to us, unanswerable objections :

" 1. They render conveyances far more complex, verbose, and expensive than is at all requisite, and they perpetuate in deeds the use of a technical language which, although intelligible to lawyers, is to the rest of the community a mysterious jargon.

" 2. Where a conveyance to uses contains limitations intended to take effect at a future day, they may be entirely defeated by what is technically called a disturbance of the seisin—in other words, by a forfeiture or change of the estate of the person seised to the use.

" 3. It is frequently very difficult to determine whether the uses in a conveyance are so created as to be executed by the statute, and whether a particular limitation is to take effect as an executed use, as an estate at common law, or as a trust. These difficulties are, and must continue, while uses are preserved, a constant source of litigation.

§ 10.—" It is to remove these serious inconveniences (and others not of trifling import might be added) that the revisers propose the entire abolition of uses, while by the new provisions which they have suggested, all the benefits admitted to flow from

the present system are retained and increased. By making a grant, without the actual delivery of possession or livery of seisin, effectual to pass every estate and interest in lands (as is proposed in a subsequent article), the utility of conveyances deriving their effect from the Statute of Uses is superseded, and a cheap, intelligible, and universal form of transferring titles is substituted in their place. The new modifications of property which uses have sanctioned are preserved by repealing the rules of the common law, by which they are prohibited, and permitting every estate to be created by grant which can be created by devise. And this is the effect of the provisions in relation to expectant estates contained in the first article of this title.

§ 11.—"It only remains to speak of trusts, as they now exist by law, and the changes in relation to them which the revisers propose. There are three classes of trusts, each requiring to be noticed:

"1. Where the trustee has only a naked and formal title, and the whole beneficial interest or *right in equity to the possession and profits is vested in those for whose benefit the trust* is created.

"2. Where the trustee is clothed with some actual power of disposition or management, which cannot be properly exercised without giving him the legal estate and actual possession.

"3. Trusts arising or resulting by implication of law.

§ 12.—"As to the first class, or formal trusts, it is plainly needless to retain them. They separate the legal and equitable estate for no purpose that the law ought to sanction. They answer no end whatever but to facilitate fraud, to render titles more complicated, and to increase the business of the Court of Chancery. They are, in truth, *precisely what uses were before the Statute of Uses, and are liable to many of the same objections.* Formal trusts we therefore propose to abolish by converting those which now exist into legal estates, and prohibiting their creation in future. This is substantially to carry the Statute of Uses into effect according to its original intention.

§ 13.—"The second class, or active trusts, as a late writer (Mr. Humphreys) has properly termed them, are recognized in

every system of law, and their utility, under proper restrictions, is undeniable. They seem, indeed, indispensable to the proper enjoyment and management of property. The revisers, therefore, propose to retain them, only limiting their continuance (for reasons stated in a subsequent note) and defining the purposes for which they may be created.

§ 14.—"As to implied trusts, they cannot be abolished, as their existence is necessary to the prevention of fraud. An important change is, however, proposed, in preventing a secret resulting trust from being created by the act of the party claiming its benefit. This change (which is recommended also by other reasons) is indispensable if the other parts of the plan are adopted; since otherwise the prohibition to create formal trusts in future would be readily evaded, and they would continue in substance to exist, and in their worst form."

§ 15. **The Revised Statutes.**—In accordance with the views thus expressed, the following changes were effected by the Revised Statutes :[1]

§ 16. **Uses and trusts abolished.**—"Uses and trusts concerning real property, except as authorized and modified by this article, have been abolished ; every estate or interest in real property is deemed a legal right, cognizable as such in the courts, except as otherwise prescribed in this chapter." Real Prop. L., § 71. But it is to be noticed that in abolishing trusts, and powers, Real Prop. L., § 110, the Legislature did not, and could not, abolish any inherent jurisdiction of the Supreme Court, in equity, over trustees.

§ 17. **Certain uses confirmed.**—"Every estate which is now held as a use, excuted under any former statute of the State, is confirmed as a legal estate." *Id.*, § 70.

§ 18. **Express trusts.**—Express trusts in real property, vest-

[1] The wording of the present Real Property Law, which went into effect October 1st, 1896, and which does not differ materially from the revision in the sections cited, is here followed.

ing the title in the trustee, may be created for "one or more" (the Revised Statutes said "any or either") of four (and only four) specified purposes. *Id.*, § 76 (*post*, § 394).

§ 19. **Other attempted express trusts**.—As to attempted trusts, not falling within the scope of the permitted classes, it was provided that they should, according to their nature, either (*a*) be void; (*b*) if merely passive, transfer an absolute title to the proposed beneficiary; or (*c*) take effect as valid powers in trust. (These dispositions are discussed *post*, Chap. XI.)

§ 20. **Implied, resulting, and constructive trusts.**—The section relating to passive trusts, and the preceding sections of the same article, do not extend to the trusts arising or resulting by implication of law, whether classified as implied, resulting, or constructive. Real Prop. L. § 73. Such trusts are illustrated and dealt with in the following cases: *Foote* v. *Bryant*, 47 N. Y. 544 (547); *Johnston* v. *Spicer*, 107 N. Y. 185; *Billar* v. *Loundes*, 2 Dem. 590; *Goldsmith* v. *Goldsmith*, 145 N. Y. 313; *Hirsh* v. *Auer*, 146 N. Y. 13 (19); *Matter of Will of O'Hara*, 95 N. Y. 403; *Rogers* v. *N. Y. & T. L. Co.*, 134 N. Y. 197 (214); *Johnson* v. *Fleet*, 14 Wend. 176; *Wheeler* v. *Reynolds*, 66 N. Y., 227 (233–4); *Hall* v. *Erwin*, 66 N. Y. 649; *Peck* v. *Peck*, 110 N. Y. 64 (71); *Piper* v. *Hoard*, 107 N. Y. 73; *Moyer* v. *Moyer*, 21 Hun, 67; *Wright* v. *Douglass*, 7 N. Y. 564; *Garfield* v. *Hatmaker*, 15 N. Y. 475; *Bates* v. *L. M. Co.*, 130 N. Y. 200 (205); *Norton* v. *Mallory*, 63 N. Y. 434. The term *implied trusts* is used in the law in two senses. In the first it refers to those which the law implies "from certain *acts* or *relations* of parties from which an intention to create a trust is supposed to exist" (Bispham's Equity, § 78), and which are called also *resulting* or *presumptive* trusts (*Id.*); and those which "exist purely by construction of law without any actual or supposed *intention* that a trust should be created, but merely for the purpose of asserting rights of parties or of frustrating fraud" (*Id.*), and which are therefore termed *constructive* trusts (*Id.*). Thus, in one of the paragraphs above quoted from the reviser's report, it is said that "as to *implied* trusts, they cannot be abolished, as their existence is necessary to the prevention of fraud."

In the second of the two senses above referred to, the term "implied trust" means a very different thing; it refers to a case where the trust is not expressed in explicit terms, but where, from an inspection of all the words that are employed, it is evident that an intention existed to create an express trust, and that what was said, or written, necessarily *involves* a trust. Thus, Perry, in his work on trusts, defines the term "implied trusts" in this sense, saying: "Implied trusts are trusts that the courts imply from the *words* of an instrument, where no express trust is declared, but such words are used that the court infers or implies that it was the purpose or intention of the parties to create a trust" (§ 25). It is in this sense that our courts use the term when they say that an express trust may be implied. For example, one of the four authorized classes of express trusts in real property covers trusts "to receive and apply rents," etc. And if a will devises land to a trustee to *apply* the rents, etc., though it says nothing in terms about the receipt of rents, yet it is held that the direction to apply necessarily involves authority to receive. Thus one essential feature of the trust is implied; but the devise, thus construed, creates an express trust. All its terms have been ascertained from the expressions of its creator.

§ 21. **Grant to one, consideration paid by another.**—There was, however, one resulting trust that was abolished, with certain exceptions. On this point the Revised Statutes provided that "Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section." 1 R. S., § 51. "Every such conveyance shall be presumed fraudulent, as against the creditors, at that time, of the person paying the consideration; and where a fraudulent intent is not disproved, a trust shall result in favor of such creditors, to the extent that may be necessary to satisfy their just demands." *Id.*, § 52. "The provisions of the preceding fifty-first section shall not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance, in his own name, without the consent or

knowledge of the person paying the consideration, or where such alienee, in violation of some trust, shall have purchased the lands so conveyed, with moneys belonging to another person." *Id.*, § 53.

§ 22.—These provisions are now re-arranged as follows: "A grant of real property for a valuable consideration to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands; but the title vests in the grantee, and no use or trust results from the payment to the person paying the consideration, or in his favor, unless the grantee either,

"1. Takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration, or,

"2. In violation of some trust, purchases the property so conveyed with money or property belonging to another."

The purpose and scope of these provisions are explained in the following cases: *Woerz* v. *Rademacher*, 120 N. Y. 62 (67); *Schierloh* v. *Schierloh*, 148 N. Y. 103; *McCartney* v. *Bostwick*, 32 N. Y. 53; *Siemon* v. *Schurck*, 29 N. Y. 598; *Marvin* v. *Marvin*, 53 N. Y. 607; *Everett* v. *Everett*, 48 N. Y. 218; *Foote* v. *Bryant*, 47 N. Y. 544 (548); *Lounsbury* v. *Purdy*, 18 N. Y. 515; *Niver* v. *Crane*, 98 N. Y. 40; *Garfield* v. *Hatmaker*, 15 N. Y. 475; *Schultze* v. *Mayor*, 103 N. Y. 307; *Robbins* v. *Robbins*, 89 N. Y. 251; *Brown* v. *Cherry*, 57 N. Y. 645; *Reitz* v. *Reitz*, 80 N. Y. 538; *Bork* v. *Martin*, 132 N. Y. 280; *Hosford* v. *Merwin*, 5 Barb. R. 51; *Tracy* v. *Tracy*, 3 Bradf. 57; *Brewster* v. *Power*, 10 Pai. Ch. 562; *Bodine* v. *Edwards*, *Id.* 504; *Russell* v. *Allen*, *Id.* 249; *Padgett* v. *Lawrence*, *Id.* 170; *White* v. *Carpenter*, 2 Pai. Ch. 217 (238); *Sayre* v. *Townsend*, 15 Wend. 647 (649); *Gage* v. *Gage*, 83 Hun, 362; *McCahill* v. *McCahill*, 71 Hun, 221 (11 Misc. 258); *Hubbard* v. *Gilbert*, 25 Hun, 596; *Knickerbocker L. I. Co.* v. *Hill*, 3 Hun, 577; *Gilbert* v. *Gilbert*, 2 Abb. Ct. App. Dec. 256. The sections above quoted have no application where the trust is expressly reserved in and by the grant, or is declared by another

instrument, thus relieving it from the effect of a secret trust. *Woerz* v. *Rademacher*, 120 N. Y. 62.

§ 23. **Implied and resulting trusts—bona-fide purchaser.**—It was also provided that "an implied or resulting trust shall not be alleged or established, to defeat or prejudice the title of a purchaser for a valuable consideration without notice of the trust." Real Prop. L. § 75.

§ 24. **In general.**—Such were the most marked features of the new system adopted in 1830. The revision also introduced many other provisions, elaborating the details of the scheme, and dealing with the rights of the beneficiaries' creditors in surplus rents and profits; the nature of the trustee's title; the nature of the beneficiary's right to enforce the trust; the title, and the right of disposition, of the creator of the trust in the property, subject to the trust; the nature and scope of the beneficiary's power to transfer his rights (and, under the present law, in certain cases, to extinguish the trust by release); the rights of creditors of the trustee and of *bona fide* purchasers; the restrictions imposed on the trustee (and later, the authority of the court in certain cases to permit sale or mortgage, and of the trustee to lease, sometimes without, and sometimes with, the permission of the court); the protection of persons paying money to the trustee in good faith; the duration of the trust term and its cessation; the devolution of the estate; the resignation and removal of the trustee and the appointment of successors (and later, the standing of a trust for religious, educational, charitable, or benevolent purposes, where the beneficiaries are indefinite and uncertain); the suspension of the absolute power of alienation, and special provisions relating to trusts for accumulation.

§ 25. **Powers.**—The existing law of powers was also abrogated, and a new code of law on that subject adopted, which is fully considered in later chapters. *Post*, § 529, *et seq.*

§ 26. **Personal property.**—All these provisions related in terms to real property. A few brief sections dealt specifically with certain similar features relating to personalty, and to a cer-

tain extent in terms rendered the statutes affecting real property applicable to personalty. The courts in a long series of decisions have established the principle that in general the provisions affecting trusts and powers apply by analogy to personal property; but to this principle there are important exceptions. *Post*, Chap. XXXI.

§ 27. **The real property law.**—The Real Property Law, which went into effect on October 1st, 1896, follows closely the scheme of the Revised Statutes. It repeals the old provisions, and substitutes others which embody a very large number of petty changes in phraseology. Some of the changes, while probably not intended to alter the law, seem open to a charge of introducing uncertainty. Others incorporate recent statutes intended to alter the law, while still others appear to introduce alterations in the law for the first time.

§ 28. **The revisers' report.**—The courts have frequently referred to the report of the revisers of 1830 for light in construing the provisions of the Revised Statutes. *Coster* v. *Lorillard*, 14 Wend. 263 (297, 327); *Hawley* v. *James*, 16 Wend. 60 (131); *Hartnett* v. *Wandell*, 60 N. Y. 346 (355).

§ 29. **Express trust defined.**—An express trust in real or personal property exists when the legal title is vested in one person, subject to a duly expressed obligation, resting upon him and enforceable in equity alone,[1] to deal with the same in some lawful and defined manner, for the benefit of another.[2]

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[1] For a consideration of the question of jurisdiction in any cases in the courts of law to award damages against the trustee for breach of his duty, on the theory that the trust involves a contract on his part to perform it, see and compare 1 Lewin on Trusts, p. 16; Professor Ames's articles in 5 Harv. L. Rev. 389, and 1 *Id.* 1 (9, 10); the passage quoted below, § 30, note 1, from Pollock and Maitland's "History of English Law;" the remarks of Judge Rapallo in *Gilman* v. *McArdle*, 99 N. Y. 451 (461, 462); also *post*, §§ 374, 730; 2 Perry on Trusts, § 843.

[2] As to cases where the trustee himself has an individual interest in the property held in trust, or its income, or proceeds, see *Woodward* v. *James*, 115 N. Y. 346 (357), and *post*, § 115, *et seq.*

§ 30. **Express trust distinguished** from

(*a*) *Common law liability.*—If one person has the mere custody or management of personal property, but the general legal title and beneficial ownership is in another, there is no technical trust. The term trust is sometimes applied to such cases, but only to indicate a fiduciary relationship in reference to the property. See *Kane* v. *Bloodgood*, 7 Johns. Ch. 90 (111). Illustrations are found in the case of factors, *Wallace* v. *Castle*, 14 Hun, 25 ; *Standard Refinery* v. *Dayton*, 70 N. Y. 486 ; *Kelly* v. *Scripture*, 9 Hun, 283 ; auctioneers ; other agents to sell ; agents to buy, to collect, to pay out, and others, as classified by Professor Ames in his " Cases on Trusts," pp. 27, 28, where numerous New York cases are cited. On the other hand, if one is merely obligated to pay to another a certain amount of money (not a specified fund) there is still no trust at all. He is a mere debtor. Such a situation exists when one makes a general deposit in a bank. He is the creditor of the bank and entitled to draw an equal sum, but not to draw the same money, and has no claim on any fund representing, even theoretically, the same money. The money deposited becomes the absolute property of the bank.

The same distinctions may arise where real property is transferred. For example, if A puts his land in charge of B, as A's agent to care for it, there is no trust.[1] So if A transfers the title

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[1] " The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has [*i.e.*, at the early period under discussion] an eventful future before it, the ' use, trust, or confidence.' . . . Now, in few, if any, of these cases [*i.e.*, a conveyance by a crusader to another, to the use of the former's wife and children during his absence ; a conveyance of a house to the borough community to the use of the Franciscan friars, the law of whose being forbade them to own anything, etc.] can the *ad opus* [see *ante*, § 7, note] be regarded as expressing the relation which we conceive to exist between a principal and an agent. It is intended that the ' feoffee to uses ' (we can employ no other term to describe him) shall be the owner or legal tenant of the land, that he shall be seised, that he shall bear the burdens incumbent on owners or tenants, but he is to hold his rights for the benefit of another. Such transactions seem to have been too uncommon to generate any definite legal theory. Some of them may have been enforced by the ecclesiastical courts. Assuredly if the citizens of London had misappropriated the lands conveyed to them for the use of the friars, they would have known what an interdict meant. Again, in some cases the feoffment

to real or personal property to B, and B thereupon agrees to pay to A a specified sum annually for life, or to furnish A with a comfortable support, this is a mere personal contract. B owns the property absolutely, and is at liberty to sell it and spend the proceeds as he chooses. If he fails to perform his contract, he is liable for damages. But if the legal title to real or personal property is transferred by A to B, merely for the duly expressed purpose that he shall receive the rents *thereof* and apply them to A's use, an express trust exists, and if B fails to perform his duty, A can proceed in equity for an accounting. In the latter case, B holds the title in his capacity of trustee ; in the former, in his individual capacity. *Gilman* v. *McArdle*, 99 N. Y. 451 ; *Todd* v. *Monell*, 19 Hun, 362 ; *Hungerford* v. *Cartwright*, 13 Hun, 647 ; *Herrick* v. *Starkweather*, 54 Hun, 532.[1]

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might perhaps be regarded as a ' gift upon condition,' and in others a written agreement about the occupation of the land might be enforced as a covenant. But at the time when the system of original writs was taking its final form ' the use ' had not become common enough to find a comfortable niche in the fabric. And so for a while it lives a precarious life until it finds protection in the ' equitable ' jurisdiction of the chancellors. If in the thirteenth century our courts of common law had already come to a comprehensive doctrine of contract, if they had been ready to draw an exact line of demarcation between ' real ' and ' personal ' rights, they might have reduced ' the use ' to submission and found a place for it in their scheme of actions ; in particular, they might have given the feoffor a personal, contractual, action against the feoffee. But this was not quite what was wanted by those who took part in these transactions ; it was not the feoffor, it was the person whom he desired to benefit (the *cestui que use* of later days), who required a remedy ; and, moreover, a remedy that would secure him not money compensation, but the specific enjoyment of the thing granted. ' The use ' seems to be accomplishing its manifest destiny when at length after many adventures it appears as ' equitable ownership.' " 2 Pollock and Maitland's " History of English Law," 226, 229, 230.

[1] The distinction is well illustrated also by a comparison of the two cases of *Gilman* v. *McArdle*, *supra*, and *Holland* v. *Alcock*, 108 N. Y. 312, both relating to provisions to procure the saying of masses. They are criticised by Professor Ames in his luminous article on the *Tilden Will Case* in 5 Har. L. Rev. 389. Still, disregarding the *dicta* in the opinion in the former case, the decisions may be found harmonious in this, that in the *Holland* case, there was a bequest to a trustee in trust to employ the legacy in paying for masses, and the provision was held invalid because it violated what was, under our law as it then stood, the essential requirement of a defined and living beneficiary to enforce the trust, the willingness of the trustee to perform it not sufficing ; while in the *Gilman* case the decision sustaining the disposition

So where A turns over money or other property to B for the benefit of C, a third party, if no title passes out of A, the transfer raises no question of a technical trust. If title does pass, the existence of a trust depends on the nature of the transaction. If B takes title merely for the duly expressed purpose that he shall receive and apply the income *thereof* to the use of C, this involves an express trust, for the very property itself is affected by the agreement and becomes the property not of B individually, but of B as trustee, for the use of C. In such a case C can enforce the performance of the trust in equity. But if the agreement is that the money or other property shall belong to B, but that he shall pay certain specified sums to C, this is a mere personal obligation. Upon breach thereof, C, not being the beneficiary of a trust, has no standing in equity; and not being a party to the agreement, cannot sue for damages at law. Though in this latter case, if A was under a liability to C, and made the agreement with B for the purpose of satisfying that liability, C, the third party, may sustain an action at law against B. *Townsend* v. *Rackham*, 143 N. Y. 516; *Clark* v. *Howard*, 150 N. Y. 232; *Guy* v. *Landon*, 84 Hun, 218; *Lawrence* v. *Fox*, 20 N.Y. 268; *Williams* v. *Fitch*, 18 N. Y. 546; *Gifford* v. *Corrigan*, 117 N. Y. 257; *Martin* v. *Funk*, 75 N. Y. 134; *Smith* v. *Perine*, 121 N. Y. 376 (384); *Hutchings* v. *Miner*, 46 N. Y. 456; *Kelly* v. *Roberts*, 40 N. Y. 432 (438), and cases cited.

If the person who makes the personal agreement embodies it in a form which itself constitutes property, as if he gives back a mortgage to A, to secure the performance of his agreement for C's benefit, here A, as mortgagee, holds the mortgage in trust for C, if such was the intent, *McPherson* v. *Rollins*, 107 N. Y. 316; but if it was not so intended, but was, for example, intended to be of a testamentary character, and revocable, to secure

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really rested on the view that the decedent had, in his lifetime, paid another person in advance, upon a mere contract that the latter would procure the saying of masses. "The intention, manifestly, was that the title to the money should pass to the defendant in consideration of his promise that he would expend an *equivalent sum* in the designated masses, and this was the substance of the contract." (*Gilman* case, p. 462.) In that view, there being no obligation to employ the fund for the defined purpose, but merely a personal promise, on consideration, to spend a like amount to accomplish that purpose, there would be no trust.

payments to C after A's death, unless earlier revoked, A would not hold it in trust. *Townsend* v. *Rackham*, 143 N. Y. 516.

In contrast with the transactions just discussed, the owner of personal property, delivering it to B for the benefit of a third party, may part with title himself and yet not make B either a trustee or an absolute owner. For example, if the owner wishes to make a gift of personal property to C, and to vest title directly in him, he may, with that intent, make the delivery to B merely as the representative of the donee. Thereupon the donee acquires title, and may bring suit against the holder, who is a mere custodian for him. So even in the case of real property, A's deed to C may be delivered to B as the grantee's representative.[1] *Post*, § 93.

§ 31. (*b*) *Fiduciary capacity.*—The term "trust" is frequently employed, in a loose way, in connection with mere fiduciary relations, and the term "fiduciary" is sometimes construed to refer, in given instances, solely to technical express trusts. Thus, the provision of the United States Bankruptcy Act (R. S. 5117, § 33) exempting from discharge debts created while acting in a "fiduciary character," referred to cases of technical trusts actually and expressly constituted, and did not include those implied by law from contract relations. *Lawrence* v. *Harrington*, 122 N. Y. 408 (412); and cases there cited. Ames's "Cases on Trusts," 2d ed., p. 28.

§ 32. (*c*) *Charge on property.*—The fact that property is transferred subject to a charge, as of debts or legacies, does not render the transferee a trustee. The charge merely diminishes *pro tanto* his beneficial interest. So far as his title goes, over and above the charge, it is purely beneficial. The remedy of the creditor or legatee, as against that property, is to enforce the charge. *Downer* v. *Church*, 44 N. Y. 647 (651); *Dill* v. *Wisner*, 88 N. Y. 153 (158); *Walker* v. *Downer*, 55 Hun, 75;

[1] An absolute transfer of property by a debtor to a creditor in payment of the debt, the amount of which is not definitely ascertained, and an agreement by the creditor to pay back an amount equal to the surplus, if any, over and above the actual debt when ascertained, does not render the creditor a trustee. *Willson* v. *Law*, 112 N. Y. 536.

Jackson v. *Atwater*, 19 Hun, 627; *Emmons* v. *Cairns*, 3 Barb. R. 243 (244); *Shangle* v. *Hallock*, 6 App. Div. 55 (62). Of course a legacy in trust may itself be charged on the land if testator has expressed that intent. *Wiltsie* v. *Shaw*, 100 N. Y. 191.

§ 33. (*d*) *Personal charge.*—Where, as in the case of a devise or bequest, some payment, as of a legacy to a third person, is imposed upon the person who takes title, there is still no trust. On accepting the gift he assumes the obligation to pay. But this is merely a personal obligation, and does not involve his doing any act relating to the specific property for the benefit of another. *Gridley* v. *Gridley*, 24 N. Y. 130; *Loder* v. *Hatfield*, 71 N. Y. 92 (97).

§ 34. (*e*) *A use.*—This is explained by the revisers in the portion of their Report above quoted. See also *Helck* v. *Reinheimer*, 105 N. Y. 470, and Pollock and Maitland's "History of English Law, as quoted *ante*, § 30, note.

§ 35. (*f*) *A power in trust.*—The chief distinction here is that in a valid express trust the trustee is vested with the legal title, while a power in trust does not require any title in the person exercising the power. Of all the purposes for which a trustee might, before the Revision of 1830, be vested with the legal title to real property, only four specified classes now remain (see *post*, § 394). All other trust purposes in respect to real property, so far as they are active in character, are now to be effected by means of a power in trust if the acts directed can lawfully be thus carried out, the title meanwhile remaining in the donor of the power, or in his grantees, heirs, or devisees, subject to the execution of the power. For a discussion of the distinction, see *Tilden* v. *Green*, 130 N. Y. 29 (53); *Cochrane* v. *Schell*, 140 N. Y. 516 (531); *Selden* v. *Vermilya*, 3 N. Y. 525 (536); and *post*, Chap. XIII., *et seq.*

§ 36. (*g*) *A precatory trust* exists where there is a disposition of property, coupled with an expression of desire as to its use. *Riker* v. *St. Luke's Hospital*, 35 Hun, 512; aff'd 102 N. Y. 742; *Willets* v. *Willets*, 103 N. Y. 650 (opinion given in 20

Abb. N. C. 471). In Professor Ames's "Cases on Trusts" there is an exhaustive collection of cases, classified by jurisdictions, where the question was whether the given instruments created a trust or an absolute gift. They are there arranged under the following heads: (1) Not a trust (p. 82); (2) beneficial gift subject to a trust obligation in favor of a third party (pp. 87–89), citing (gift to a wife for life, "for the support of herself and her children") *Billar* v. *Loundes*, 2 Dem. 590; also *Collister* v. *Fassitt*, 7 App. Div. 20; but compare *Pell* v. *Folger*, 68 Hun, 443; *Shangle* v. *Hallock*, 6 App. Div. 55; (3) same, save that the obligation was merely moral, not legal (pp. 89–91), citing (residuary bequest to S.: "It is my desire and request that S. shall watch over and care for my friend W., and see that at no time is she allowed to suffer or want for the necessaries of life") *Wilde* v. *Smith*, 2 Dem. 93; also *Lawrence* v. *Cooke*, 104 N. Y. 632; *Clark* v. *Leupp*, 88 N. Y. 228; *Riker* v. *St. Luke's Hospital*, 35 Hun, 512; affi'd 102 N. Y. 742; (4) object indefinite, words precatory, no trust (pp. 93, 94), citing *Matter of Keleman*, 126 N. Y. 73; also *Wyman* v. *Woodbury*, 86 Hun, 277 (282); (5) object indefinite; words mandatory; trust; but the intended trust, being for indefinite objects, ineffective, citing *Willets* v. *Willets*, 103 N. Y. 650; *Matter of Ingersoll*, 131 N. Y. 573; (6) subject, object, and mode of distribution clearly defined; words mandatory; trust (pp. 97, 98) citing *Phillips* v. *Phillips*, 112 N. Y. 197; (7) subject, object, and mode of distribution clearly defined; words merely precatory; no trust (pp. 98, 99), citing *Wood* v. *Seward*, 4 Redf. 271; *Bowker* v. *Wells*, 2 How. Pr. n. s. 150; also *Matter of Keleman*, 126 N. Y. 73; *Clay* v. *Wood*, 91 Hun, 398; (8) discretion given as to mode of distribution among persons of defined class; words mandatory; trust (pp. 99–101), *Colton* v. *Colton*, 127 U. S. 300; (9) discretion given as to mode of distribution among persons of defined class; words precatory; no trust (pp. 101–103), citing *Foose* v. *Whitmore*, 82 N. Y. 405. Where the question is whether a gift or devise is absolute, and the expressed wishes or desires of testator are mere suggestions, or the gift is subject to an imperative direction creating a trust or charge, the rule is, *first*, that if the expression of desire so depends on the discretion of the general devisee as to be incapable of execution without superseding that discretion, there is no trust

or charge ; and *second*, if it is so definite as to amount and subject matter as to be capable of execution by the court, there is or is not a trust or charge according to the testamentary intention. *Phillips* v. *Phillips*, 112 N. Y. 197 (204) ; *Collister* v. *Fassitt*, 7 App. Div. 20.

A devise "to A for him to hold for the benefit of his children, *if he so elects*," has been held to create a trust, the election referring not to his choice to hold absolutely or as trustee, but to his choice to accept or renounce the trust. *Barnard* v. *Crossman*, 54 Hun, 53.

§ 37. (*h*) *Executorship.*—The distinction between an express trust and an executorship is more fully discussed later on (*post*, § 156, *et seq.*) ; but, in brief, it may here be said that in the first place an executor as such has no title to real property, and indeed nothing at all to do with it unless he needs to have it sold to raise funds ; and, in the second place, as to personal property, while an executor has title, in a sense, it is a different kind of title from that required in an express trust ; it is a title given him by the law to enable him to settle up the estate, while a trustee's title, under a will, is derived from the will itself through an express or implied bequest of property to him in trust.

§ 38. (*i*) *Guardianship, committee of lunatic, etc.*—The distinction in point of title is obvious, and is illustrated in *Matter of Strasburger*, 132 N. Y. 128 ; *People ex rel. Smith* v. *Comm'rs of Taxes*, 100 N. Y. 215 ; *McCabe* v. *O'Connor*, 4 App. Div. 354 ; *Matter of Hawley*, 104 N. Y. 250 (261) ; *Pharis* v. *Geer*, 110 N. Y. 336 ; *Matter of Otis*, 101 N. Y. 581.

§ 39. (*j*) *Special statutory trusts* may be created or permitted by the Legislature, as in the case of Shaker trusts, *White* v. *Miller*, 71 N. Y. 118 ; cemetery trusts, L. 1894, chap. 658 ; in City Chamberlain, *Chesterman* v. *Eyland*, 81 N. Y. 398 ; in Board of Education, *Betts* v. *Betts*, 4 Abb. N. C. 317 (404, 405) ; in Surrogate, *Matter of Coffin*, 36 Hun, 236 ; Supervisor, *Iseman* v. *Myres*, 26 Hun, 651.

§ 40. (*k*) *Trusts created by decree*, as where a decree requires a fund to be deposited in court. *Wiggins* v. *Howard*, 83 N. Y. 613.

§ 41. (*l*) *Pure trust.*—See *McCartney* v. *Bostwick*, 32 N. Y. 53.

CHAPTER II.

CREATION OF EXPRESS TRUSTS.

(1) *Who may Create a Trust.*

§ 42. **Statutory provisions.**—"A citizen of the United States is capable of holding real property within this State . . ." Real Prop. L. § 2. "A person other than a minor, an idiot, or person of unsound mind, seised of or entitled to an estate or interest in real property, may transfer such estate or interest." Real Prop. L. § 3. Thus, within the scope of its powers and charter purposes, a corporation may create a trust—*e.g.*, by an assignment for the benefit of creditors. Bishop on "Insolvent Debtors," 3d ed., § 117.

"All persons except idiots, persons of unsound mind and infants may devise their real estate, by a last will and testament, duly executed. . . ." 2 R. S. 56, § 1, as amended L. 1867, chap. 782, § 3.

"Every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate, by will in writing." 2 R. S. 60, § 21, as amended L. 1867, chap. 782, § 4.

§ 43. **Aliens.**—Under the foregoing provisions, aliens, in so far as capable by statutes applicable to the particular case, of *holding* lands, may (it seems in all cases) grant or devise the same in trust. (As to cases in which aliens may hold, grant, and devise land in New York, see as to the period prior to October 1st, 1896, the statutes collected in Birdseye's R. S. [1st ed.], p. 2517 *et seq.*, and L. 1893, chap. 207, and for the present laws, see *post*, § 110.) They are under no disability in holding or disposing of personal property.

§ 44. **Infants—By grant.**—In spite of the exclusion of infants by the foregoing statutory provisions from the class of those who may alien land, an infant's executed grant of land in trust is not void, but voidable, as in the ordinary case of an absolute conveyance by an infant, and will generally be deemed ratified, and thus become just as valid and effectual as the conveyance of an adult unless disaffirmed by the infant when he arrives at age, or within a reasonable time thereafter. *Beardsley* v. *Hotchkiss*, 96 N. Y. 201 (211), where, however, the trust was solely for the infant's own benefit, and was in fact ratified by subsequent acts. See also *Temple* v. *Hawley*, 1 Sandf. Ch. 153; *Dominick* v. *Michael*, 4 Sandf. R. 374; *Wetmore* v. *Kissam*, 3 Bosw. 321; *McIlvaine* v. *Kadel*, 3 Robt. 429; *Jackson* v. *Bouchin*, 14 Johns. R. 124; *Voorhis* v. *Voorhis*, 24 Barb. R. 150; *Palmer* v. *Miller*, 25 Barb. R. 399; Tyler on Infancy, Chap. V. In general, a trust deed, voidable on any ground, is not ratified by the affirmative acts of the creator while he is in ignorance of its character and of the essential facts, and supposes that he is ratifying something else. *Barnard* v. *Gantz*, 140 N. Y. 249 (258).

§ 45. **Infants—By parol.**—The rules as to the ratification or disaffirmance of an infant's acts in creating a trust of personal property, are those applicable to his absolute dispositions. *Beardsley* v. *Hotchkiss*, 96 N. Y. 201 (211); *Sparman* v. *Kein*, 83 N. Y. 245; *Bool* v. *Mix*, 17 Wend. 131; *C. N. Bank* v. *Strauss*, 137 N. Y. 148; *Stafford* v. *Roof*, 9 Cow. 626; *Chapin* v. *Shafer*, 49 N. Y. 407; *Yates* v. *Lyon*, 61 N. Y. 344.

§ 46. **Infants—By devise.**—An infant's devise of land is void, the exclusion of infants from the statutory grant of testamentary power over land being absolute. 2 R. S. 56, § 1, as amended L. 1867, chap. 782, § 3.

§ 47. **Infants—By bequest.**—See *ante*, § 42.

§ 48. **Married women.**—Under the present law married women are under no disability in reference to the disposition of their property, real or personal. Domestic Rel. Law, §§ 20, 21.

§ 49. **Beneficiary as creator of trust.**—If the creator of the trust is also the beneficiary or a beneficiary, this fact does not *per se* render the trust void. *Bliss* v. *West*, 58 Hun, 71 (74), aff'd 132 N. Y. 589; *Sloan* v. *Birdsall*, 58 Hun, 317 (321); *Rosenburg* v. *Rosenburg*, 40 Hun, 91. As to the rights of his creditors to reach the trust fund in such a case, see *post*, § 710.

§ 50. **Trustee as creator of trust.**—The owner of property may create, or furnish evidence of, a valid trust by duly declaring that he holds the same in trust for another. *Post*, § 63, *et seq.*

(2) *Essential Elements of a Trust.*

§ 51. **Essentials of express trusts.**—The requirements which the law recognizes or imposes in the constitution of an express trust[1] are:

§ 52. (*a*) *An intent* to create a trust, *Beaver* v. *Beaver*, 117 N. Y. 421 (428); *Pierson* v. *Drexel*, 11 Abb. N. C. 150; *Matter of Crise*, 2 Con. 59; *Pickslay* v. *Starr*, 149 N. Y. 432; *Haviland* v. *Willets*, 141 N. Y. 35; *Haux* v. *Dry Dock Savings Institution*, 2 App. Div. 165; *Dinley* v. *McCullagh*, 92 Hun, 454; or, if reliance is placed upon proof of a declaration of trust, then it is equally essential that an *intent* to make such a declaration appear. *Beaver* v. *Beaver*, 137 N. Y. 59 (65); *Wadd* v. *Hazelton*, 137 N. Y. 215; *Young* v. *Young*, 80 N. Y. 422; *Curry* v. *Powers*, 70 N. Y. 212 (219). But proof of an intention to transfer title to a donee or a trustee does not show any intent to declare a trust; and an intent to declare a trust is not an intent to transfer the title. In the nature of things the two intents are entirely different and inconsistent (*post*, § 106). The presence of the *intention* is a question of fact, *Haux* v. *Dry Dock Savings Institution*, 2 App. Div. 165; though of course the facts admitted or proved in a given case may be such as to render it a conclusion of law that an intention did (*Williams* v. *Guile*, 117 N. Y. 343 [347]; *Pickslay* v. *Starr*, 149 N. Y. 432) or did not (*Wadd* v. *Hazelton*, 137 N. Y. 215 [220]) exist.

[1] See the definition of an express trust, *ante*, § 29.

And the intent must be actual; a trust procured through duress, fraud, or undue influence, or emanating from a person who is mentally incompetent, is of course invalid. *Matter of Livingston*, 34 N. Y. 555 (570–573).

§ 53. (*b*) *Specified property*, to be held in trust; (*c*) a *trustee;* and (*d*) a *beneficiary*. *Phelps' Ex'r.* v. *Pond*, 23 N. Y. 69 (77); *Green* v. *Green*, 125 N. Y. 506 (510); *Rose* v. *Hatch*, 125 N. Y. 427 (431); *Sherwood* v. *American Bible Society*, 4 Abb. Ct. App. Dec. 227. These three, as providing an estate to be held, a person to hold it, and a person for whom it is held, are sometimes, as in the cases above cited, spoken of as the elements essential to the very conception of a trust, and without which it could not, in the nature of things, exist.

§ 54. (*e*) *A deed*[1] or conveyance containing fit expressions is necessary to effect the creation of a trust *inter vivos* in real property, though a declaration of trust may be proved by any writing subscribed by the declarant; while trusts of personal property may be created or declared by deed, or any writing, or orally; and a trust of either real or personal property may be created by will. *Post*, § 64 *et seq.*

§ 55. (*f*) *The vesting of title* in the trustee, effected by *delivery*, either actual or constructive, of the property affected (except that when a trust is *declared*, the property remains with the declarant, the title shifting from him individually to himself as trustee). *Post*, § 63, *et seq.*

§ 56. (*g*) *A certain term.*— *Underwood* v. *Curtis*, 127 N. Y. 523 (538); *Crooke* v. *County of Kings*, 97 N. Y. 421 (436). *Post*, Chap. VI.

§ 57. (*h*) *Certain purposes*, if the trust is of real property, as to which four are prescribed as the only ones authorized (*post*, § 394; compare, however, *post*, § 513 *et seq.* relating to the charitable, &c., trusts now authorized), omission to designate

[1] Notice the omission by Real Prop. L. § 208, of the words "and sealed," which occurred in the section which it supersedes.

one or more of which is fatal. *Dillaye* v. *Greenough*, 45 N. Y. 438. But trusts in personal property may be created for any purpose not in itself illegal. *Post*, § 414. But even in the case of personal property, one particular purpose (the accumulation of income) is specifically authorized and limited by statute, and in creating such a trust, the provisions of the statute must be complied with. *Post*, § 413.

§ 58. (*i*) *Authority to receive rents and profits* must be conferred in the trust instrument in order to establish certain testamentary trusts in real property. *Post*, § 146.

§ 59. **Non-essentials.**—Whether a written instrument is required or is employed though not requisite, or the trust is duly created orally, *no particular phraseology* is necessary, if the words used convey and embody the due and lawful intent. Thus: (*a*) The word "trustee" need not be used, *Morse* v. *Morse*, 85 N. Y. 53 (60); *Gersen* v. *Rinteln*, 2 Dem. 243; its absence does not negative the intent to create a trust, nor does its presence indicate conclusively the existence of such an intent, *Hathaway* v. *Hathaway*, 37 Hun, 265; *Bacon* v. *Bacon*, 4 Dem. 5; nor the word "trust," *Morse* v. *Morse*, 85 N. Y. 53 (60); cf. *Rogers* v. *N. Y. & T. L. Co.*, 134 N. Y. 197 (213). (*b*) The conveyance or will need not contain a grant or devise, in so many words, to the trustee in order to give him title, if the duties imposed are such as to render title essential for their performance. *Underwood* v. *Curtis*, 127 N. Y. 523 (537) and cases cited below. Thus it may be implied from a direction to receive the rents, pay expenses of the estate, and apply the net rents. *Marx* v. *McGlynn*, 88 N. Y. 357 (375); *Savage* v. *Burnham*, 17 N. Y. 561 (568); *Underwood* v. *Curtis*, 127 N. Y. 523 (537); *Toronto G. T. Co.* v. *C. B. & Q. R. R. Co.*, 123 N. Y. 37 (44); *Woodward* v. *James*, 115 N. Y. 346; *Robert* v. *Corning*, 89 N. Y. 225 (236); *Morse* v. *Morse*, 85 N. Y. 53 (60); *Donovan* v. *Van De Mark*, 78 N. Y. 244; *Tobias* v. *Ketchum*, 32 N. Y. 319 (327); *Leggett* v. *Perkins*, 2 N. Y. 297 (305); *Matter of Herrick*, 32 State Rep. 1032 (1035); *Craig* v. *Craig*, 3 Barb. Ch. 76 (94); *Vail* v. *Vail*, 4 Pai. 317 (328). See *Pittman* v. *Johnson*, 35 Hun, 38; aff'd 102 N. Y. 742. Precatory

words may suffice for this purpose. *Phillips* v. *Phillips*, 112 N. Y. 197. See *Manice* v. *Manice*, 43 N. Y. 303 (387). And even when it is "convenient and reasonably necessary," *Ward* v. *Ward*, 105 N. Y. 68 (74) that the title be in him, the intent to give it to him may be inferred, and so, even though there be in form a devise to the beneficiary, if nevertheless an intent to vest title in the trustee appear. *Leggett* v. *Perkins*, 2 N. Y. 297 (305). But where there is no express devise to trustees *and also* no actual necessity for vesting the title in them, no trust will ever be inferred. *Persons* v. *Snook*, 40 Barb. R. 144 (156); *Williams* v. *Freeman*, 98 N. Y. 577 (580, 584); *Orphan Asylum* v. *White*, 6 Dem. 201 (204); *Heermans* v. *Robertson*, 64 N. Y. 332 (343); *Henderson* v. *Henderson*, 113 N. Y. 1 (11); *Post* v. *Hover*, 33 N. Y. 593 (599); *Foose* v. *Whitmore*, 82 N. Y. 405 (406); *Manice* v. *Manice*, 43 N. Y. 303 (364); *Germond* v. *Jones*, 2 Hill, 569. And, on the other hand, there may be, in words, a grant or devise to a trustee, and yet, an intent displayed in the entire instrument, that he shall not take title will control, so as to give him a mere power. Thus, a devise of property to A, followed by a devise of the same property to trustees with power to sell, and invest the proceeds for A's benefit for life, does not confer title in the land on the donees of the power or cut down A's interest from a fee to a life interest. A takes in fee subject to the power to sell and invest. *Vernon* v. *Vernon*, 53 N. Y. 351 (362). (*c*) The term of duration of the trust deed need not be defined in the form of an express description. It is enough if it can be definitely ascertained from the nature of the provisions found throughout the deed or will. *Matter of Smith*, 131 N. Y. 239 (246). (*d*) The beneficiary need not be designated by name. It is enough if he is designated with such definiteness that he would be entitled, as a right, to enforce in equity the performance of the trust. *Tilden* v. *Green*, 130 N. Y. 29 (53). On this subject, see *post*, § 365, *et seq.* (*e*) And in general, no particular verbal formula is required. *Morse* v. *Morse*, 85 N. Y. 53 (60); *Vernon* v. *Vernon*, 53 N. Y. 351 (359); *Shepard* v. *Gassner*, 41 Hun, 326. See also *Cruger* v. *Cruger*, 5 Barb. R. 225 (238); *Verdin* v. *Slocum*, 71 N. Y. 345; *Hamer* v. *Sidway*, 124 N. Y. 538 (550); *Downing* v. *Marshall*, 23 N. Y. 378; *Beekman* v. *Bonsor*, 23 N. Y. 298 (314); *Brew-*

ster v. *Striker*, 2 N. Y. 19 (36); *Leggett* v. *Perkins*, 2 N. Y. 297 (305); *Jarvis* v. *Babcock*, 5 Barb. R. 139 (144); *Craig* v. *Craig*, 3 Barb. Ch. 76 (94–97); *Vail* v. *Vail*, 4 Pai. 317 (328); *Gott* v. *Cook*, 7 Pai. Ch. 521 (536 *et seq.*) 24 Wend. 641; *Donovan* v. *Van DeMark*, 78 N. Y. 244; *Matter of Carpenter*, 131 N. Y. 86; *Hirsh* v. *Auer*, 146 N. Y. 13 (19). Thus a gift of "full control" for designated purposes for which a trust may be created, for a duly designated beneficiary, and for a duly limited term, creates a trust and vests title in the trustee. *Hathaway* v. *Hathaway*, 37 Hun, 265. All the details of the trustee's powers and duties need not be enumerated, such as to collect dividends, assign securities, sell stock, reinvest proceeds, etc., if general terms, such as sell, convert, collect, etc., are used. *Fellows* v. *Heermans*, 4 Lans. 230 (240). As to implied authority to receive rents, see *post*, § 146. (*f*) No notice to the beneficiary is requisite to the creation of a trust. *Rogers' Locomotive etc. Works* v. *Kelly*, 88 N. Y. 234 (238); *Witzel* v. *Chapin*, 3 Bradf. 386. Upon delivery it becomes irrevocable (unless power to revoke is reserved), even though the beneficiary has no notice. *Meiggs v. Meiggs*, 15 Hun, 453 (457). So the delivery may be made to a third person (*post*, § 93), and no notice to the trustee is essential to the creation of the trust. 1 Perry on Trusts, § 105.

§ 60. Essentials, when implied.—So essential expressions may be *implied*. That is to say, while an express trust, as already stated, is one which is set forth, or "expressed," in words, the words required for that purpose need not in express terms create a trust by that name nor employ expressly any technical terms appropriate to the creation of a trust. It is sufficient if the provisions that are expressed are such as necessarily do imply a trust. *Ante*, § 59. *Shepard* v. *Gassner*, 41 Hun, 326; *Hathaway* v. *Hathaway*, 37 Hun, 265, cited 134 N. Y. 214; *Marx* v. *McGlynn*, 88 N. Y. 357 (376); *Vernon* v. *Vernon*, 53 N. Y. 351 (359); *Johnston* v. *Spicer*, 107 N. Y. 185; *Byrnes* v. *Baer*, 86 N. Y. 210 (219–220); *Robert* v. *Corning*, 89 N. Y. 225 (237); *Leggett* v. *Perkins*, 2 N. Y. 297 (305). See *Phillips* v. *Phillips*, 112 N. Y. 197 (204). Where provision is made by will for a widow (executrix), and also for others, in the rents of land,

and the question is whether she is vested with the title to all, in trust, the fact that she is given "one half the income of the whole estate," instead of all the income of one half the estate, is important as an indication that some one was to lease and manage the whole, pay charges, and distribute rents, and in such a case full "control" being also given to the testatrix, a trust was implied. *Woodward* v. *James*, 115 N. Y. 346 (356).

§ 61. **Essentials, when not implied.**—Essential expressions will not, however, be implied, if the trust be a void trust. There is no such anomaly in the law as a trust raised by construction only to be destroyed in the moment of its creation. *Smith* v. *Edwards*, 88 N. Y. 92 (102). See *Woodward* v. *James*, 115 N. Y. 346 (357); *Henderson* v. *Henderson*, 113 N. Y. 1 (11); *Bliven* v. *Seymour*, 88 N. Y. 469 (477); *Mann* v. *Witbeck*, 17 Barb. R. 388 (392). See *Greene* v. *Greene*, 125 N. Y. 506. Compare *Cochrane* v. *Schell*, 140 N. Y. 516 (527). Nor will a trust be implied if a power in trust will serve for the purposes set forth. *Post* v. *Hover*, 33 N. Y. 593 (601); *Heermans* v. *Robertson*, 64 N. Y. 332 (343); *Tucker* v. *Tucker*, 5 N. Y. 408. But if the trust is *expressed*, the fact that a power would serve will not invalidate the trust. *Morse* v. *Morse*, 85 N. Y. 53 (60).

And so also the court will be disinclined to imply a trust where the result would be to invalidate *another part* of the will by making it illegal in combination, and so requiring it to be severed and annulled. If, by refusing to create a trust by implication, the entire scheme of the will can be maintained, and all parts made valid, this course is strongly preferred. *Roseboom* v. *Roseboom*, 81 N. Y. 356 (359); and cases cited. See also *Terry* v. *Wiggins*, 47 N. Y. 512 (517); *Crozier* v. *Bray*, 120 N. Y. 366 (375); *Roe* v. *Vingut*, 117 N. Y. 204. And further, as the mere absence of the word "trustee" does not vitiate a trust, so its mere presence does not create one. *Matter of Hawley*, 104 N. Y. 250 (261). And a power to sell land and hold the *proceeds* in trust does not create a trust in the *land*. It is a mere power as to the land. The trust attaches only to the proceeds. *Harvey* v. *Brisbin*, 50 Hun, 376, see s. c. 143 N. Y. 151; *Vernon* v. *Vernon*, 53 N. Y. 351 (362).

§ 62. **General rule.**—Subject to these principles, the whole matter may be summed up by saying that it is sufficient if the intention to create a trust which would be valid under the Statute can be fairly collected from the expressions of the instrument; and that what is implied in the language used is, as in other cases, deemed to be expressed. See *ante*, § 20. *Tobias* v. *Ketchum*, 32 N. Y. 319 (327).

(3) *The Trust Instrument.*

§ 63. **Introduction.**—An express trust may be created by will, or *inter vivos*. In the latter case, it may be created or rendered capable of proof in either one of two methods: The person who holds the title may (1) transfer it to a trustee to hold in trust for the transferror or for some third person; or may (2) "declare" that he himself holds it in trust. In the first of these cases, he transfers it to another person; while in the other he effects a transfer from himself individually to himself as trustee or furnishes evidence that it is as trustee that he holds title. The various features of this subject will now be discussed. In real property, the transfer is effected by deed (or will), but a declaration of trust may be proved by other writings; while in personal property no writing at all is required (except in trusts created by will).

(*a*) *Real Property.*

§ 64. **Conveyance, when required.**—"An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing [for illustrations of express trusts created by deed, see *Douglas* v. *Cruger*, 80 N. Y. 15; *Nearpass v. Newman*, 106 N. Y. 47; *Wallace* v. *Berdell*, 97 N. Y. 13; *Thebaud* v. *Schermerhorn*, 30 Hun, 332; *Van Cott* v. *Prentice*, 104 N. Y. 45; *Hutton* v. *Benkard*, 92 N. Y. 295 (299)], subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent [*Lowenstein* v. *Flaurand*, 82 N. Y. 494], thereunto authorized by writing." Real Prop. L., § 207. (The Act relating to assignments for the benefit of creditors, authorizes execution by an

attorney in fact "duly authorized." *Lowenstein* v. *Flaurand*, 82 N. Y. 494. Bishop on Insolvent Debtors, 3d ed. p. 164.)[1]

§ 65. **Conveyance, when not required.**—"But this section [just quoted] does not affect the power of a testator in the disposition of his real property by *will* (for illustrations, see *Fowler* v. *Ingersoll*, 127 N. Y. 472; *Asche* v. *Asche*, 113 N. Y. 232; *Stevenson* v. *Lesley*, 70 N. Y. 512); nor prevent any trust from arising or being extinguished by implication or operation of law (*Foote* v. *Bryant*, 47 N. Y. 544 [547]; and *ante*, § 20), *nor any declaration of trust from being proved by a writing subscribed by the person declaring the same.*" Real Prop. L., § 207.

§ 66. **Definition—Real property—Estate.**—"The terms 'real property' and 'lands,' as used in this chapter [Real Property Law], are coextensive in meaning with lands, tenements, and hereditaments." Real Prop. L., § 1. See also *Id.* §§ 240, 280. And "the terms 'estate' and 'interest in real property,' include every such estate and interest [*i.e.*, in real property], freehold [defined Real Prop. L., §§ 23, 24], or chattel [defined *Id.*], legal or equitable, present or future [defined *Id.*, §§ 25–29], vested or contingent [defined *Id.*, § 30]." Real Prop. L., § 205.

§ 67. **Definition—Conveyance.**—"The term 'conveyance,' as used in this article [*i.e.*, on Conveyances and Mortgages], includes every instrument, in writing, except a will, by which any estate or interest in real property is created, transferred, assigned, or surrendered." Real Prop. L., § 205.

"The term 'conveyance' [*i.e.*, as used in the article on Recording] includes every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected . . . except a will," etc. Real Prop. L., § 240.

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[1] "Every grant or assignment of any existing trust in lands, goods, or things in action, unless the same shall be in writing, subscribed by the party making the same, or by his agent lawfully authorized, shall be void." 2 R. S. 137, § 2. 1 Perry on Trusts, § 79, and cases there cited.

"A grant in fee or of a freehold estate, must be *subscribed* [omitting the words "*and sealed*" contained in 1 R. S. 738, § 137, for which this section was substituted by the Real Property Law] by the person from whom the estate or interest conveyed is intended to pass, or by his lawful agent. If not duly acknowledged before its delivery, according to the provisions of this chapter, its execution and delivery must be attested by at least one witness, or, if not so attested, it does not take effect as against a subsequent purchaser or encumbrancer until so acknowledged." Real Prop. L., § 208. As to acknowledgment, see Real Prop. L., § 242.

§ 68. Statute not retroactive.—"This chapter [Real Property Law] does not alter or impair any vested estate, interest, or right, nor alter or affect the construction of any conveyance, will, or other instrument which has taken effect at any time before this chapter becomes a law." Real Prop. L., § 1.

§ 69. Creation and declaration—Distinction.—Theoretically speaking, an express trust is *created* when the owner, by a legal conveyance transfers title to another, upon a valid trust; it is *declared* when, by any method recognized by the law, the holder of the legal title admits that he holds in trust. In one case, the transfer of title is the creative act; in the other, there is no transfer of title, but a mere furnishing of legal evidence of an existing trust (as in *Govin* v. *de Miranda*, 140 N. Y. 474 [477]). Practically, however, this distinction may or may not correspond to the actual situation in a given case. For it often happens, in a given case, that a declaration does, in fact, constitute the creative act (as in *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135); for whenever one who holds the legal and equitable title, and also enjoys the beneficial interest, wishes not only to create a trust for the benefit of another, but also to be himself the trustee, his most natural and convenient method is to *declare* that he holds the land on a specified trust. And in no case is it necessary to go behind a valid written declaration, made by one who was apparently a beneficial owner, to see whether or not there was in fact a pre-existing trust. *Hutchins* v. *Van Vechten*, 140 N. Y. 115 (120). As said by the court in *Day* v. *Roth*, 18 N. Y. 448 (453), dec-

larations of trust "are not [*i.e.*, not in all cases] to be regarded as admissions of some antecedent fact in relation to the subject, but are to be looked upon and received as constituting the very trust which they acknowledge. The doctrine of equity is that by their own force they impress the fund with a peculiar character, and hence they are receivable on the same grounds as a precise and formal agreement." This statement is made in a case where it did not appear, prior to the declaration, whether the declarant held a particular fund in trust or was merely a debtor.

But the distinction may be of vital consequence, as where, according to some authorities, the declarant has no right to *create* a trust in the property, and where the declaration can only be sustained on the theory that it furnishes evidence of an existing trust. Thus, after an owner has made a general assignment, for the benefit of creditors, of property which, so far as existing evidence goes, is his absolutely, and has thereby parted with the title, he cannot *create* a trust therein in himself for other parties by using the form of a declaration ; yet it has been held that he may, by declaring that he held it in trust at the time of the assignment, furnish evidence which, if believed, will withdraw it from the assignment. *Gardner* v. *Rowe*, 2 Sim. & Stu. 346 ; aff'd 5 Russ. 258 ; *In re Farmer*, 18 Nat. Bank. Reg. 207 (216), both cited in Ames's "Cases on Trusts" (179–181), where also some doubt seems to be thrown on their soundness. Compare *Wright* v. *Douglass*, 7 N. Y. 564.

In *Barry* v. *Lambert*, 98 N. Y. 300, an executor made a declaration that a certain portion of a fund invested in a mortgage, held by him as executor, in reality belonged to a third party and not to the estate. It was held that while an executor has no authority to create an original liability on the part of the estate or bind it by a new contract, yet he has power to transfer property of the estate for the purposes of his trust, and therefore any act of his which has this effect is within his authority and binds the estate ; that accordingly a declaration embodying the actual fact, of a right of the third party to the share in question, constituted a valid declaration of trust. "Such a declaration could in no just sense be said to *create* any liability against the estate." "The arrangement shown by such a declaration, instead of *creating* a liability against the estate, would simply have the effect of

protecting the party advancing the money from an unjust claim of ownership on the part of the executors, by reason of the form in which the securities for the loan were taken." The two classes of declaration are also there mentioned—those where, in fact, the owner thereby intends to divest himself of beneficial ownership and *create* a trust, and those where one already holding in trust avows the fact; the court say that an unequivocal declaration in due form, plainly implying that the declarant intends to divest himself of his interest in the property, and to hold it thereafter for the use and benefit of another, is all that is required to create a trust even as against the *owner*. "But when the legal title is in one party and the equitable ownership in another, it is only necessary for *those facts* to appear, in order to constitute the holder a trustee for the benefit of the other" (p. 307). But a declaration by A, that certain property held by him is not his, but is held in trust for B, while admissible on B's behalf, as against A's heirs or representatives, or any one claiming under A, cannot be used by A as against C, who claims that it was held by A as trustee for C. It is only admissible as a declaration by A against his own interest, and can only be used accordingly. *Brennan* v. *Hall*, 131 N. Y. 160. Compare with *Barry* v. *Lambert*, *supra*.

§ 70. **Declaration—Legal title.**—In declaring a trust, the legal title remains in the settlor. He now avows that he holds in a different capacity, but it is not essential to the validity of the trust that the property should be formally transferred by him as an individual to himself "as trustee." Thus, in a case of shares of corporation stock, a declaration that the settlor "dedicates and sets apart . . . all the income and dividends . . . in trust for," etc., is valid, though there is no transfer of the stock on the books of the company to the holder as trustee. "He held the legal title to the stock, but necessarily held it, from the date of his declaration, as trustee for the beneficiaries."[1] *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135.

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[1] As to the general principle that a gift of income or rents carries the beneficial interest in the *corpus*, see *Wells* v. *Wells*, 88 N. Y. 323 (331); *Schermerhorn* v. *Cotting*, 131 N. Y. 48 (59).

§ 71. **Declaration—Conveyance—Mere writing.**—It will be noticed that the statute above quoted, § 64, first provides that no trust in land shall be *declared*, unless by act or operation of law, or by a *deed or conveyance in writing*, and then goes on to say that this provision "does not . . . prevent . . . any declaration of trust from being proved by *any writing* subscribed by the person declaring the same." These two provisions, the rule and the qualification, appeared as two distinct sections in the Revised Statutes. The explanation of this apparent discrepancy is stated by the Court of Appeals (*Hutchins* v. *Van Vechten*, 140 N. Y. 115) as follows: "The English statute on this subject (29 Car. II., chap. 3) in its essential features was enacted in this State by the Act of February 26th, 1787, the twelfth section of which provides that 'all declarations or creations of trusts of any lands shall be manifested and proved by some writing signed by the party entitled by law to declare the trust.' Thus the law stood for about forty years, until the general revision of the statutes, when it was changed and made to read as follows: . . . [quoting 2 R. S. 135, § 6, being the first part of the present statute, *ante*, § 64, requiring a deed or conveyance in writing]. After the revision a trust of the character claimed by the plaintiff in this case could not be created or established except by a *deed or conveyance* in writing. But by chap. 322 of the Laws of 1860 the Legislature restored the law to its original condition by an amendment to the *seventh* section [being the latter part of the present section, *ante*, § 64], substantially providing that a declaration of trust in lands might be proved by any writing subscribed by the party declaring the same. It is not necessary now to procure a deed or a formal writing intended for the purpose in order to prove the trust, but letters or informal memoranda signed by the party, and even admissions in a pleading in another action between other parties, if signed by the party with knowledge of its contents, will satisfy the requirements of the statute, if they contain enough to show the nature, character, and extent of the trust interest. (*Forster* v. *Hale*, 3 Vesey, Jr., 696; *Fisher* v. *Fields*, 10 Johns. 494; *Wright* v. *Douglass*, 7 N. Y. 564; *Cook* v. *Barr*, 44 *Id.* 156; *Loring* v. *Palmer*, 118 U. S. 321; 2 Story, Eq. Jur. § 972; *McArthur* v. *Gordon*, 126 N. Y. 597; *Urann* v. *Coates*, 109 Mass. 581.)" Also *Corse* v. *Leggett*, 25 Barb. R. 394.

In the Hutchins case (140 N. Y. 115) the evidence showed (1) a power of attorney to one P., given by the alleged trustee, defendant, to sell the land ; (2) a letter written and signed by defendant to P., referring to the power and stating : " Whatever is realized you will understand that it belongs to Waldo Hutchins and myself, jointly and equally, and any further instructions Mr. Hutchins may give you you may comply with" ; (3) another paper, unsigned, but wholly in the defendant's handwriting, describing the land. There were also other letters written by defendant.

The court add : " It is not necessary to the plaintiff's case to show that the trust was created by or originated in a writing. The statute enacts a rule of evidence and is satisfied if the trust is *manifested or proved* by a writing, however it originated, whether by parol arrangement or otherwise." *Crane* v. *Powell*, 139 N. Y. 379 ; *Hutchinson* v. *Hutchinson*, 84 Hun, 482 ; *Hutchins* v. *Van Vechten*, 140 N. Y. 115. The defendant in this latter case held the record title, but in fact he and the plaintiff's testator were interested therein as tenants in common. It was not, therefore, one of the four express trusts authorized by statute, but one arising under what is now Real Prop. L. § 72 : " Every person, who, by virtue of any grant, assignment or devise, is entitled both to the actual possession of real property, and to the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest" (except as to certain trusts existing on January 1st, 1830).

§ 72. **When no writing required.**—Although a writing is requisite to prove a declaration of trust in land, yet if the person who holds land under an oral agreement sells the land, and then makes an oral declaration of the trust, and subsequently uses the proceeds to buy other land, the oral declaration will impress the trust upon the proceeds, and enable the beneficiaries to trace the same into the land last purchased and fasten the trust upon that. *Tracy* v. *Tracy*, 3 Bradf. 57. Compare *Bork* v. *Martin*, 132 N. Y. 280 ; *Robbins* v. *Robbins*, 89 N. Y. 251 ; *Goldsmith* v. *Goldsmith*, 145 N. Y. 313.

§ 73. **Declaration—Mere writing—Illustrations.**—The decisions dealing with alleged declarations made while the Revised Statutes were still unamended by the Laws of 1860, above referred to, of course recognize the necessity of some conveyance, though the declaration itself, contained therein, need not take on the form of a grant—*e.g.*, it might be contained in the reciting part of a conveyance. *Wright* v. *Douglass*, 7 N. Y. 564 (569); *Van Epps* v. *Van Epps*, 9 Pai. Ch. 237. But during the period preceding the original revision, and also since the amendment effected in 1860, by which a deed or conveyance became no longer requisite, there have been illustrations of valid declarations resting merely on writings other than grants. Thus, in an action brought to establish a trust, the proof consisted in a verified answer of the defendant, in an action previously brought against him by a third party, which contained allegations tending to show the trust contended for. The court says: "It is no longer required that trusts should be proved by some deed or conveyance creating or declaring them; but they may be proved by any writing subscribed by the party. The statute does not require that the writing should be *inter partes;* but within the letter and spirit of the law, any writing subscribed by the party will be sufficient if it contain the requisite evidence. I, therefore, entertain no doubt that the alleged trust in this case could be proved by the answer of the defendant, which was given in evidence, if it was sufficiently manifested in the answer." *Cook* v. *Barr*, 44 N. Y. 156. It was there held not to be sufficiently manifested. So in *Hutchins* v. *Van Vechten* (140 N. Y. 115), above referred to, where the writings were a power of attorney, and letters signed by the defendant. Many other illustrations are collected in 1 Perry on Trusts, § 82. But though a mere writing suffices, nothing less will answer. In the case of real property there must be a writing. *Follett* v. *Badeau*, 26 Hun, 253 (256); *McCahill* v. *McCahill*, 71 Hun, 221; s. c. 11 Misc. 258. Numerous English and American cases are cited in Ames's "Cases on Trusts," p. 178, note, illustrating the various permissible forms in which a declaration may be evidenced.

§ 74. **Declaration—Other essentials.**—Although a mere dec-

laration, written and subscribed, is a sufficient evidence of a trust, yet the declaration, to be thus effective, must be legally sufficient in its contents. *Matter of Crise*, 2 Con. 59. Thus, where a lessee of land made oral admissions that he was erecting buildings thereon "for the benefit of A," and that he had received some money from A, this was held insufficient as a declaration that he held the lease in trust for A. *Duffy* v. *Masterson*, 44 N. Y. 557. So, an admission by defendant that two certain mortgages were given by him for the accommodation of plaintiff, to enable the latter to borrow money, does not show that defendant holds the land itself in trust for plaintiff. "The writing must show that there is a trust and what it is, and failing in this, it is insufficient." *Cook* v. *Barr*, 44 N. Y. 156. "The evidence [where real property is involved] must all be in writing without resorting to parol evidence, even to connect different writings together;" oral testimony, in the case of land, is not "admissible to supply any defects or omissions in the written evidence;" in such case, "to give effect to the trust would be, in truth, to repeal the Statute of Frauds." *Id.*, p. 161, citing authorities. So, where A bought land, and, to defraud his creditors, took title in name of B, who was ignorant that this was done, and after A's death B quitclaimed the property to C, a stranger, for no consideration save C's promise that if any of A's heirs should turn up in distress C would help them to the extent of one or two hundred dollars, this promise of C does not constitute a declaration of trust to raise any legal or equitable title to the land in A's heirs. This was a suit by the heirs to recover the value of the lots from C. On the facts in the case cited, A had never had any title which he or his heirs could have enforced against B. *Robertson* v. *Sayre*, 134 N. Y. 97.

It should, however, be added that a formal declaration that certain specified property, held by the declarant, is not his at all, but belongs to a person named, is not defective for indefiniteness. Enough is said to show who is the real owner. *Govin* v. *de Miranda*, 140 N. Y. 474. But such a case must be distinguished from a mere acknowledgment that money belonging to another has been received and may be withdrawn by the latter at any time. Such a statement, if contemplating not a fund to be held, actually or theoretically, till called for, but a liability

to pay an equivalent sum, sets forth a mere indebtedness for the amount named, and not a trust. *Budd* v. *Walker*, 113 N. Y. 637.

§ 75. **Summary.**—Arising out of the distinction between creating and declaring trusts comes this difference : So long as one is seeking only to prove that a trust *does exist* in real property, he may rely solely on any relevant writings signed by the alleged trustee ; but if he cannot prove its *existence* by declarations, and seeks by other means to prove specifically the original transfer to the present holder, upon a trust, he must produce a conveyance (or will) creating it.[1]

§ 76. **Recording.**—" A conveyance of real property, within the State, on being duly acknowledged by the person executing the same, or proved as required by this chapter [Real Property Law], and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county [Register in certain counties] where such real estate is situated. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded." Real Prop. L., § 241. The bearing of this provision on voluntary deeds of trust and declarations of trust is illustrated in the following cases : *Ten Eyck* v. *Witbeck*, 135 N. Y. 40 ; *Van Epps* v. *Van Epps*, 9 Pai. Ch. 237 (240, 273) ; *Smith* v. *Bowen*, 35 N. Y. 83 ; *White* v. *Price*, 39 Hun, 394 (397) ; aff'd 108 N. Y. 661. As to place of record, see also Real Prop. L., § 240, and compare L. 1896, chap. 572, § 2.

§ 77. **Incorporation by reference.**—In trusts created by will, the validity of attempted incorporation of other papers, by referring to and identifying them, sometimes comes in question. This topic belongs properly in the general field of the law of

[1] Other principles apply in the case of trusts raised by the law, for the prevention of fraud, as, for example, where the custodian of funds invests them in land and takes the title in his own name. In such a case the trust would not be an express trust. *Ante*, § 22.

wills. The leading case on the subject is now *Booth* v. *Baptist Church*, 126 N. Y. 215, with which compare the cases there cited, and also and particularly *Brown* v. *Clark*, 77 N. Y. 369. Also an article by Eugene D. Hawkins, 29 Albany L. J., p. 484. As to references in deeds to outside instruments, see *Dupre* v. *Thompson*, 8 Barb. R. 537. A power to appoint a remainder according to directions contained in another paper separate from the will is not valid. *Martin* v. *Pine*, 79 Hun, 426 (430); *Langdon* v. *Astor's Exr's*, 16 N. Y. 26; *Williams* v. *Freeman*, 83 N. Y. 569; *Matter of O'Neil*, 91 N. Y. 516. But where the power is created by deed, see *Van Cott* v. *Prentice*, 104 N. Y. 45.

(*b*) *Personal Property.*

§ 78. **In general,** the distinction between the creation of a trust by transfer of title to another in trust, and the declaration of a trust in property to which the declarant holds the title, is the same, whether the property is real or personal. Accordingly, a number of the cases already cited to illustrate that distinction in reference to real property dealt, in fact, with personal property. But in one important respect there is a striking difference. For while a trust in real property must be created by deed or conveyance (or will), except that a declaration of trust may be proved by any writing subscribed by the declarant, etc., trusts in personal property may be created or declared by deed (*Westlake* v. *Wheat*, 43 Hun, 77), by will, by any writing, or orally. *Gilman* v. *McArdle*, 99 N. Y. 451; *Barry* v. *Lambert*, 98 N. Y. 300; *Marie* v. *Garrison*, 13 Abb. N. C. 210, 214, 270, 307; *Phipard* v. *Phipard*, 55 Hun, 433; with which compare *Von Hesse* v. *MacKaye*, 62 Hun, 463; s. c. 136 N. Y. 114; *Kennedy* v. *Porter*, 109 N. Y. 526 (547); *Govin* v. *de Miranda*, 140 N. Y. 474; *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135 (141); *Knowlton* v. *Atkins*, 134 N. Y. 313 (314); *Day* v. *Roth*, 18 N. Y. 448; *Hirsh* v. *Auer*, 146 N. Y. 13 (19). Accordingly, if a deed under seal is used, the seal is immaterial, and it may be revoked, if the power to revoke at all exists, by an instrument not under seal. *Barnard* v. *Gantz*, 140 N. Y. 249 (258). A debtor may, with the assent of the creditor, declare a trust in a fund in his hands, to

the amount of the debt, and in lieu thereof, and thereupon he becomes not a debtor, but a trustee. *Hamer* v. *Sidway*, 124 N. Y. 538 (550). In trusts of personal property, while a written instrument is not required, it is necessary, as in the case of real property, that the statements and facts relied on should show clearly the intent to declare a trust and what that trust is. "It would introduce a dangerous instability of titles if anything less [than proof of intention, beyond a reasonable doubt] was required, or if a voluntary trust *inter vivos* could be established in the absence of express words, by circumstances capable of another construction, or consistent with a different intention." *Beaver* v. *Beaver*, 117 N. Y. 421 (428); *Beeman* v. *Beeman*, 88 Hun, 14.

(4) *Delivery.*

§ 79. **Where title is transferred.**—In order to effect a voluntary transfer of title, whether in trust or not, there must be (*a*) an intent to give, beneficially or in trust (*ante*, § 52), and (*b*) delivery. If in a given case the requisite *intention* is established, then the sufficiency of the donor's acts, as found, to constitute legal *delivery* is a question of law. *Trow* v. *Shannon*, 78 N. Y. 446 (452).

§ 80. **Under declarations of trust.**—The foregoing principles apply to voluntary transfers of title from one person to another. If a trust is *declared*, so that the same person who formerly held, or appeared to hold, in his own right, now avowedly holds in trust, the act has involved and could involve no transfer of title to a third person, except the theoretical transfer from himself as an individual to himself as a trustee; but the following principles apply: The *intention to declare a trust* is essential (*ante*, § 52); but no delivery is required. In the nature of the case there can be none. *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135 (141); see *Phipard* v. *Phipard*, 55 Hun, 433. The very point is that the same person continues in possession.

But the analogous point has been raised whether, if a formal declaration is made, under seal, that declaration itself should not be delivered to some one, like any deed; or if mere writings are relied on, whether they should not be transmitted to some one or

in some way published. If the declarations are merely oral, no question can be raised, because they must perforce be addressed to some one. A soliloquy would hardly answer. The question just stated would apply to a declaration of trust in personal as well as in real property, if the declaration relied on was in fact in writing. In another form the question is, whether it will suffice to produce a writing sufficient in form, which was retained by the declarant and never in any way published to any one else. In *Govin* v. *de Miranda*, 76 Hun, 414 (419), s. c. 79 Hun, 286, it is said that "in no case has it ever been held as yet that a party may, by transferring his property from one pocket to another, make himself trustee. In every case where a trust has been established, the party creating it has placed the evidence thereof in the custody of another, and has thereby shown that it was intended to be a completed act." And the court there held that an instrument which it was assumed would have constituted a sufficient declaration of trust, if it had been delivered or placed in the hands of some one else, failed for lack of such delivery. And the court refer to and distinguish the case of *Govin* v. *de Miranda*, 140 N. Y. 474 (where a declaration of trust was upheld although never delivered to any one), as follows: That a distinction exists between cases (of which that last cited is an instance) where the holder of property declares that he is not the owner, but merely holds in trust for the owner (in which case no delivery or other publication of the declaration need be shown), and cases (of which *Govin* v. *de Miranda*, 76 Hun, 414, is an instance) where the holder merely declares that he holds in trust, thereby attempting to transfer title from himself individually to himself in trust (in which case it is said that the declaration, if in writing, must be placed in the custody of another in order to effect the change of title). It is believed that this distinction, as concerns the necessity of delivery of a declaration of trust, has not been raised in any other New York case than that last cited. It would have seemed that as no delivery of the property itself, either actual or constructive, is requisite to the validity of a declaration of trust, and as the declaration is merely evidence as against the declarant, an undelivered or unpublished declaration would still be evidence (of greater or less weight, according to circumstances). It is

clear that no delivery (in a technical sense) is required ; and it is not clear why the particular fact of showing or handing the written declaration to another person should be adopted as the sole evidence that it was intended to be a completed act. It would have seemed, for example, that a formal acknowledgment before a notary ; or careful retention of the declaration for a long period among valuable and frequently inspected papers ; or a subsequent endorsement, signed by the declarant, after a long period, that the original declaration had been duly observed by him and was to be carried out, etc., might be some evidence for consideration on the question of whether it was a completed and solemn act. And such is believed to be the law.[1]

§ 81. **In testamentary trusts.**—If a trust is created by will, no delivery of anything is of course required. The death of the owner involves a shifting of title to somebody, and the will designates who that person shall be, and whether he shall take beneficially or in trust.

§ 82. **Delivery—Inter vivos and causa mortis.**—In examining the cases on the subject of voluntary transfer of title, it is to be noticed that the *delivery* required to perfect the gift is the same whether it be a gift *inter vivos* or a gift *causa mortis ; Bedell* v. *Carll*, 33 N. Y. 581 (585) ; *Gray* v. *Barton*, 55 N. Y. 68 (72) ; *Harris* v. *Clark*, 3 N. Y. 93 (113) ; (for further illustrations of gifts *causa mortis*, see *Ridden* v. *Thrall*, 125 N. Y. 572 (575) ; *Westerlo* v. *De Witt*, 36 N. Y. 340 ; *Williams* v. *Guile*, 117 N. Y. 343 ; *Caufield* v. *Davenport*, 75 Hun, 541 ; *Loucks* v. *Johnson*, 70 Hun, 565 ; *Kenney* v. *Public Adm.*, 2 Bradf. 319 ; *Merchant* v. *Merchant*, *Id.*, 432 ; *Cambreleng* v. *Graham*, 79 Hun, 247 ; *Flood* v. *Cain*, 78 Hun, 378 ; *Farian* v. *Wiegel*, 76 Hun, 462 ; *Bliss* v. *Fosdick*, 86 Hun, 162) ; and also that gifts may be made either directly to a beneficial donee, or to a donee in trust, and in either case the delivery required is of the same nature. *Bump* v. *Pratt*, 84 Hun, 201 ; note, 6 Abb. N. C. p. 447 ; *Clough* v. *Clough*, 117 Mass. 83 ; *Sheedy* v. *Roach*, 124 Mass. 472 (475) ; *Loucks* v. *Johnson*, 70 Hun, 565. The author-

[1] See the discussion in *Martin* v. *Funk*, 75 N. Y. 134 (142).

ities relating to delivery in gifts *inter vivos* and gifts *causa mortis*, and whether beneficial or in trust, may therefore be considered together, as having an equal bearing on the requisites of delivery in the case of gifts in trust. Where the theory relied on is that of delivery in trust, the delivery must be made to the trustee, or to some person for him, and not to the beneficiary as such. This point would seem to have been overlooked in the discussion of a trust in *Durland* v. *Durland*, 83 Hun, 174 (176).

After title has actually passed by delivery to a trustee, the mere fact that the property subsequently comes back into the custody of the donor is immaterial. *Matter of Wachter*, 16 Misc. 137.

§ 83. **Delivery, what constitutes** —The leading principle is, that the delivery "must be such as to vest the donee with the control and dominion of the property [according to its nature], and to absolutely divest the donor of his dominion and control." *Jackson* v. *Twenty-third Street R. Co.*, 88 N. Y. 520 ; *Young* v. *Young*, 80 N. Y. 422 ; *Montignani* v. *Blade*, 145 N. Y. 111 (126) ; *Brink* v. *Gould*, 7 Lans. 425 ; *Irish* v. *Nutting*, 47 Barb. 370. Under a general assignment for creditors, see *South Danvers Nat. Bank* v. *Stevens*, 5 App. Div. 392 ; Bishop on Insolvent Debtors, 3d Ed., pp. 168, 291, 435.

Among the cases below cited to illustrate the requisites of delivery as applied to different forms of property, there are some which it may be difficult to reconcile with recognized principles. But there is one test which will suffice in any given case of voluntary transfer. For the delivery, actual or constructive, must always be such as to put the donee or grantee (beneficial or in trust) in a position where he needs no help from equity *as against the donor*, to complete the transfer of title. If the delivery is such as to answer that requisite, it is sufficient to establish a valid transfer. See *post*, §§ 86, 99 *et seq.*

The nature of the property in question is often such that a physical delivery of the property itself into the hands of the donee is impossible ; in other cases, while possible, it would not be reasonably feasible ; in still others, though delivery of the thing itself be feasible, delivery of something else in its stead may, in accordance with principles to be discussed, be allowed.

Carpenter v. *Soule*, 88 N. Y. 251 (257); *Beaver* v. *Beaver*, 117 N. Y. 421 (428); *McKenzie* v. *Harrison*, 120 N. Y. 261 (265–266). But in all cases the delivery, to suffice, must be such as to completely transfer the dominion and control of the property, according to its nature, from the donor to the donee. *Beaver* v. *Beaver*, 117 N. Y. 421 (429). If the donee, at the time of the gift, already has the custody of the property in question, no physical transfer to him of that property itself is possible or requisite. *Mercantile Deposit Co.* v. *Huntington*, 89 Hun, 465.

§ 84. **Delivery—Real property.**—The term gift, or gift in trust, commonly refers to personal property, though it is sometimes used in relation to voluntary conveyance of land. *Adams* v. *Adams*, 21 Wall. 185 (191). Real estate may be conveyed without consideration to a volunteer, and if the transaction is completed, so that no further act on the part of the grantor is required to perfect the grantee's dominion, the absence of consideration is, as in a gift of personalty, immaterial. In this case, the *delivery* called for to effect a voluntary transfer is delivery of a *conveyance*. Compare *Adams* v. *Adams*, 21 Wall. 185 (191). A seal, though not essential to entitle an instrument affecting land to record, *Grandin* v. *Hernandez*, 29 Hun, 399 (402); *Todd* v. *Eighmie*, 4 App. Div. 9, is, except in the case of estates less than freehold, *Warren* v. *Leland*, 2 Barb. R. 613, essential to the passing of the legal title. *Jackson* v. *Wood*, 12 Johns. R. 73; *Todd* v. *Eighmie*, 4 App. Div. 9. Attention is called to the omission from § 208 of the new Real Property Law, of the words relating to a seal in conveyances of a freehold. Execution of a trust deed by both grantor and grantee, and record, raise a presumption of *delivery*, though on the grantor's death it is found among his papers. *Bliss* v. *West*, 58 Hun, 71; aff'd 132 N. Y. 589. And where the grantor in a trust deed, and also the beneficiary, sign, seal, and acknowledge before a proper officer, who signs as witness a clause reciting delivery, and the grantor records it, these acts may constitute delivery. *Adams* v. *Adams*, 21 Wall. 185; *Rathbun* v. *Rathbun*, 6 Barb. R. 98. "If both parties be present, and the usual formalities of execution take place, and the contract is to all appearances consummated, without any conditions or qualifications annexed, it is a complete and valid deed."

4 Kent Comm. 456. In *Mercantile Deposit Co.* v. *Huntington*, 89 Hun, 465 (470), it is held that where a deed of gift of personal property is found in the possession of the donee, at the donor's death, this raises a presumption of delivery. If a trust deed is once delivered, it is not invalidated by being left in the possession of the grantor. *Wallace* v. *Berdell*, 97 N. Y. 13 (22 *et seq.*), nor by any subsequent acts indicative of ownership over the property by the grantor. *Id.*, 21–25. Nor are statements made by the creator of a trust, prior or subsequent to its creation, and not part of the *res gestæ*, competent to prejudice the title of the trustee. *Truax* v. *Slater*, 86 N. Y. 630. Nor any omission on the part of the trustee to perform his duties. *Wallace* v. *Berdell*, 97 N. Y. 13. Upon delivery, as between the parties, the title passes, and the effect of the delivery cannot be impaired in a suit by subsequent creditors involving merely the question whether the trust was or was not constituted, by any mental reservation or oral condition attached to the delivery by the grantor which would be repugnant to the terms of the deed. *Wallace* v. *Berdell*, 97 N. Y. 13 (24, 25). Delivery of the deed may be made to a third person, on behalf of the trustee, and the trust may thus be constituted, although the trustee knew neither of the delivery of the deed nor of its designation of him as trustee. *Adams* v. *Adams*, 21 Wall. 185 (192 and cas. cit.); *ante*, § 59. A trust created by deed, or otherwise *inter vivos*, cannot, as a will may, operate to bring within the trust after acquired property of the transferror. *Wade v. Holbrook*, 2 Redf. 378. The fact that a deed is recorded is not conclusive of its delivery. *Townsend* v. *Rackham*, 143 N. Y. 516; *Gilbert* v. *North Amer. Fire Ins. Co.*, 23 Wend. 43. The delivery of a deed conveying real estate, or an interest therein, or an agreement for the sale thereof, cannot be made to the grantee or other party thereto conditionally, or in escrow, and when delivered to a party, the delivery operates at once and the condition is unavailable. *Gilbert* v. *North American Fire Ins. Co.*, 23 Wend. 43; *Worrall* v. *Munn*, 5 N. Y. 229; *Braham* v. *Bingham*, 26 N. Y. 483; *Wallace* v. *Berdell*, 97 N. Y. 13; *Peo* v. *Bostwick*, 32 N. Y. 445. But the rule is otherwise as to instruments not in any way relating to or affecting real estate, and not requiring a seal for their validity, and so even though a seal be actually, but unnecessarily, attached. *Blewitt* v. *Boorum*,

142 N. Y. 357. As to mortgages of land, see *Matson* v. *Abbey*, 141 N. Y. 179 ; aff'g 70 Hun, 475.

§ 85. **Delivery—Tangible chattels.**—Here the property itself may be delivered. But to a certain extent the delivery may, even in this case, be constructive. Thus the following acts of the donor have been upheld as sufficient : (*a*) The owner of property, being present with the donee in the house where it was, and the room where most of it was, pointed out to the donee what was in sight, and said, " I give you this property, and all I have bought to-day," and went away and left it in the absolute control of the donee. The house was occupied by the donee and her husband, and they continued to use the property in the same house. *Allen* v. *Cowan*, 23 N. Y. 502. (*b*) A man and woman lived in the same boarding-house, and he maintained and treated her as a daughter, and both had access to the room in which he had a trunk. Being about to go away, and being in another room of the house, he said to her, " My trunk upstairs, and what is in it I give to you ; there is enough in it to take care of you a spell." He went away, and returned in a few days, and occupied the room, and used the trunk and clothes as usual, until he died a short time thereafter. The woman took the trunk and contents after his death, and it then contained a passbook in a savings bank. This was held to be a valid gift, as against the public administrator. *Penfield* v. *Thayer*, 2 E. D. Smith, 305 ; cited 23 N. Y. p. 505. See also *Cooper* v. *Burr*, 45 Barb. R. 9 (33). These authorities seem somewhat extreme, and there were elements of hardship which may have influenced the decisions. The fact that in some sense the donee was in each case in possession at the time of the gift may also have played some part. See also *Matter of Wachter*, 16 Misc. 137. (*c*) The question of whether chattels capable of manual delivery may be validly given by delivery of a deed of gift, without delivery of the chattels, has been much discussed. Professor Ames, in his " Cases on Trusts," p. 130, says in a note, " A deed of gift of a chattel vests the title in the donee without delivery" (of the chattel), citing many English and several American cases, including *Bunn* v. *Winthrop*, 1 Johns. Ch. 329, and *Fulton* v. *Fulton*, 48 Barb, 581 (590). In *Bunn* v. *Winthrop, supra*, one

Marston executed and delivered to one Winthrop, as trustee, a deed by which, after granting to the trustee certain premises in trust, he gave to Mrs. Curry "so much of his furniture and household goods, then in his house, as she could think sufficient toward furnishing a house in a genteel style," and all the residue of his furniture and household goods to May Bunn Marston. He continued in possession of the chattels named until his death, three years later. This was held to be a valid gift. In *Fulton* v. *Fulton*, 48 Barb. 581 (590), the property in question consisted of promissory notes, and they were delivered; but the court laid down the general proposition that "where a gift *inter vivos* is perfected by delivery of possession of the thing, *or delivery of a deed of gift*, it is complete," etc. This doctrine is assumed as correct in *Matter of Clark*, 16 Misc. 405 (413), where, however, the deed itself was not delivered, and the donor remained in possession of the chattels.

§ 86. **Delivery—Stock certificates.**—(*a*) Here the certificates themselves may of course be delivered, and should properly be endorsed in the usual form. *Transfer on the books* of the corporation is not essential to perfect the gift.[1] The assignment, power, and delivery pass the equitable title as between the donee and the corporation, and the legal and equitable title as between the donor and donee, and put the donee in a position to compel the corporation to make the transfer. *Cushman* v. *Thayer*, 76 N. Y. 365 (371), and cas. cit.; *N. Y. & N. H. R.R. Co.* v. *Schuyler*, 34 N. Y. 30 (80); *McNeil* v. *Tenth National Bank*, 55 Barb. R. 59; 46 N. Y. 325. (*b*) *Delivery of a deed* of transfer of a portion of the shares represented by a certificate retained by the donor, the deed containing a power to effect a transfer, passes the equitable title as between donor and donee. It is to be noticed that in this case some further act is required on the part of the donor, if transfer can only be effected on production of the certificate. This form of gift has nevertheless been sustained, in cases of gifts *mortis causa*, where the further act is to be done not by the donor but by his representatives, and the latter have been held to be trustees for the donee by operation of law

[1] Ames' "Cases on Trusts," 2d ed., p. 155, note.

to make the gift effectual. *Grymes* v. *Hone*, 49 N. Y. 17 (22). Compare *Matter of Crawford*, 113 N. Y. 560 (567); and see *Pennington* v. *Gittings* (Md.), cited and discussed by Professor Ames, "Cases on Trusts," 2d ed., p. 155, note, and see *post*, § 101. (*c*) *Delivery of certificates of stock without written assignment or power to transfer* is sufficient, though the stock is, by the by-laws, transferable only on the books of the corporation by the registered holder or his attorney. *Walsh* v. *Sexton*, 55 Barb. 251; *Allerton* v. *Lang*, 10 Bosw. 362; *Ridden* v. *Thrall*, 125 N. Y. 572 (577). And here also the representatives of the donor have been held to be trustees for the donee to effect a transfer. *Allerton* v. *Lang*, 10 Bosw. 362. See *post*, § 101. (*d*) *Delivery of deed of gift, containing no power* to transfer, should, according to Professor Ames ("Cases on Trusts," p. 155, note), also suffice, but he finds no authorities on the point. (*e*) *Entry of stock on the corporation books, in donee's name, and delivery* to him of the company's receipt, though no certificate is issued, is sufficient. (*Semble*), *Jackson* v. *Twenty-third Street R. Co.*, 88 N. Y. 520 (526). And in *Francis* v. *N. Y. & Brooklyn Elevated R. R. Co.*, 17 Abb. N. C. 1 (but see s. c. 108 N. Y. 93), the General Term of the Second Department held that where a holder of stock surrendered the certificates and caused others to be issued in the names of his infant children, and receipted for them in their names and took them away, but *never delivered them*, there was a complete gift of the stock. But *contra* as to registered bonds, *Matter of Crawford*, 113 N. Y. 560 (567). (*f*) *Delivery of deed of assignment* of stock owned by donor, but for which *no certificate had ever been issued*, the deed containing a power to transfer has been held sufficient. *De Caumont* v. *Bogert*, 36 Hun, 382. (*g*) Delivery by donor, a stockholder in an opera company, to the donee, of a season ticket to an opera box, which he holds as an incident to his ownership of the stock, is not a delivery sufficient to transfer the stock. *Stevens* v. *Stevens*, 2 Redf. 265.

§ 87. **Delivery—savings bank deposits.**—On this subject the cases are very numerous. The principles established by them are as follows:

(*a*) If the depositor makes the deposits in his *own name*, he

may give the fund to a donee, or to a trustee, by delivery of the passbook. *Ridden* v. *Thrall*, 125 N. Y. 572 ; *Loucks* v. *Johnson*, 70 Hun, 565. Compare *Dinley* v. *McCullagh*, 92 Hun, 454. (For cases where the bank may not rely on mere possession of the book as authority to pay, see *Gearns* v. *Bowery S. B.*, 135 N. Y. 557 ; *Abramowitz* v. *Citizens' Savings Bank*, 17 Misc. 297.) Or he may declare that he holds the same as trustee for a designated beneficiary, in which latter case a trust is thereby created. *Matter of Lent*, 1 Misc. 264. (*b*) He may make the deposit in the name of the beneficiary, and deliver the passbook ; title then vests irrevocably in the donee. *Matter of Crawford*, 113 N. Y. 560 ; *Matter of Townsend*, 5 Dem. 147. See " Michael Smith for Mary Smith," *Smith's Estate*, 17 Abb. N. C. 78. In such a case, even delivery of the book has been held not necessary. *Matter of George*, 1 Con. 241. Notice subd. *g*, *post.* (*c*) As to a deposit in the joint names of donor and donee, and delivery of the book to the latter, see *Mack* v. *M. & F. Savings Bank*, 50 Hun, 477. As to deposit in joint names, with no delivery, but an oral declaration of trust, see *Matter of Lent*, 1 Misc. 264. But the mere fact of a deposit by A in the name of " A or B," with no delivery of the book to B, does not establish a gift. *Matter of Bolin*, 136 N. Y. 177. (*d*) A deposit by a husband in the joint names of himself and wife is *prima facie* a gift to the wife in case she survives. *Roman C. O. A.* v. *Strain*, 2 Bradf. 34. Compare *Brown* v. *Brown*, 23 Barb. R. 565 ; *Young* v. *Young*, 80 N. Y. 422 (431) ; *Wortman* v. *Robinson*, 44 Hun, 357 ; aff'd 113 N. Y. 678. So with a deposit payable to the " husband or wife or the survivor." *McElroy* v. *Albany Savgs. Bank*, 8 App. Div. 46 ; *McElroy* v. *Nat. Savgs. Bank*, 8 App. Div. 192. See also *Sanford* v. *Sanford*, 45 N. Y. 723 ; s. c. 58 N. Y. 69 ; *Fowler* v. *Butterly*, 78 N. Y. 68 (72). (*e*) A deposit " in trust" for a designated beneficiary may constitute a valid declaration of trust, and place the title in the depositor as trustee. See particularly the recent case of *Cunningham* v. *Davenport*, 147 N. Y. 43, and subd. *g*, *post.* Also *Macy* v. *Williams*, 55 Hun, 489 ; aff'd 125 N. Y. 767 ; *Martin* v. *Funk*, 75 N. Y. 134 ; *Boone* v. *Citizens' Savings Bank*, 84 N. Y. 83 (86) ; *Mabie* v. *Bailey*, 95 N. Y. 206 ; *Willis* v. *Smyth*, 91 N. Y.

297; *Scott* v. *Harbeck*, 49 Hun, 292; *Anderson* v. *Thompson*, 38 Hun, 394; *Schluter* v. *B. S. Bank*, 117 N. Y. 125 (129); *Fowler* v. *B. S. Bank*, 113 N. Y. 450; *Witzel* v. *Chapin*, 3 Bradf. 386; *Terry* v. *Bale*, 1 Dem. 452; *Matter of Collyer*, 4 Dem. 24; *Crowe* v. *Brady*, 5 Redf. 1; *Weaver* v. *Emigrant, etc., Sav. Bank*, 17 Abb. N. C. 82. The test lies in the intent with which the deposit is made. Compare *Haux* v. *Dry Dock Savings Institution*, 2 App. Div. 165 with *Grafing* v. *Heilmann*, 1 App. Div. 260; *Millard* v. *Clark*, 80 Hun, 141. (*f*) Subsequent declarations of the depositor that he "has given," or present words of gift, such as "I hereby give," are ineffectual to constitute a gift without delivery. *Hoar* v. *Hoar*, 5 Redf. 637. But where A deposits in his own name the money of B, pursuant to the latter's request, and on the understanding that it is to be held solely for B, this renders A, by legal construction, a trustee. *Davis* v. *Davis*, 86 Hun, 400. See also *Lowery* v. *Erskine*, 113 N. Y. 52 (58). Delivery of donor's check on a savings bank, payable after his death (invalid gift, see *post*, § 91), and contemporaneous delivery of the bank book intended only to assist the donee of the check in securing the money thereafter, the donor reserving the right to interest and control of the book, is insufficient. *Curry* v. *Powers*, 70 N. Y. 212. So with a deposit by A, in the name of B, where A signed in his own name the request to the bank to receive the deposit and declaration of assent to the by-laws, and the by-laws were such as to give complete dominion to the holder of the book, which was retained by the depositor. *Beaver* v. *Beaver*, 117 N. Y. 421; s. c. 137 N. Y. 59. Nor could the facts in the Beaver case sustain the transaction as a declaration of trust, for no *intent to declare a trust* appeared; for this purpose proof of intent to *give* does not help out the theory of a declaration, and is, in fact, inconsistent with it. See *post*, § 106. As to invalid gifts of bank deposits, see also *Matter of Ward*, 2 Redf. 251; *Orr* v. *McGregor*, 43 Hun, 528. (*g*) Where one deposits money in a savings bank in his own name "as trustee," or "as guardian," or "in trust" for another person designated, the form of the deposit does not conclusively establish a trust. The rule in such a case is that even if the depositor retains the bank book, and gives no notice to the beneficiary,

yet if the depositor *dies before the beneficiary*, leaving the trust account *open and unexplained*, a trust is established. If the intent can be strengthened by acts and declarations of the depositor in his lifetime, amounting to publication of his intent, a more satisfactory case is made out; but this is not absolutely essential, in the absence of explanation, where he dies leaving the trust account existing. But while the depositor is alive he may deny his intention to create a trust or to give the money to the person named, and may thus frustrate any attempt, based on the mere form of the deposit, to fasten a trust upon it, even though he offer no explanation of his reasons for opening the deposit in the form adopted. And he may, even after the death of the person named, have the deposit transferred to his own name. *Cunningham* v. *Davenport*, 147 N. Y. 43. Compare *Hyde* v. *Kitchen*, 69 Hun, 280. The same principle applies where one makes a deposit directly in the name of another, except that there the form of deposit might be weaker evidence of intent to create a trust or make a gift, even where the depositor dies first, leaving the account unexplained, than where the deposit assumed in terms the form of a trust. *Cunningham* v. *Davenport*, *supra*, p. 47. And even where the trust form is adopted, and the trustee dies first, evidence of contemporaneous facts and circumstances constituting *res gestæ*, may be admitted to show that the real motive of the depositor was not to create a trust. *Id.*, and *Haux* v. *Dry Dock Savings Institution*, 2 App. Div. 165; *Hyde* v. *Kitchen*, 69 Hun, 280. Compare the case of a deposit by A in the name of B "subject to the control of A." *Millard* v. *Clark*, 80 Hun, 141. And even if a trust is thus in fact created, evidence is admissible to show that the beneficiary duly accepted other property from the trustee in lieu of such deposit, though the deposit still stood in form as in trust. See *O'Brien* v. *Weiler*, 68 Hun, 64, aff'd 140 N. Y. 281.

§ 88. **Delivery—Certificates of deposit.**—The fund represented may be given by delivery of the certificate, either endorsed, *Westerlo* v. *De Witt*, 36 N. Y. 340 (345); or unendorsed. *Matter of Hall*, 16 Misc. 174. See *Kurtz* v. *Smither*, 1 Dem. 399. And so a fund belonging to A, placed in the hands of B, an individual, for custody and investment, represented by B's receipt

held by A, may be given to B. its custodian, by delivery to him of his own receipt. *Champney* v. *Blanchard*, 39 N. Y. 111. See also Professor Ames's note, "Cases on Trusts," 2d ed., p. 156.

§ 89. **Delivery—Insurance policies.**—Compare *Olmstead* v. *Keyes*, 85 N. Y. 593; *Whitehead* v. *N. Y. Life Ins. Co.*, 102 N. Y. 143; *Geoffroy* v. *Gilbert*, 5 App. Div. 98; *Bickerton* v. *Jaques*, 28 Hun, 119; *Ruppert* v. *U. M. I. Co.*, 7 Robt. 155; *McCord* v. *Noyes*, 3 Bradf. 139; *Garner* v. *Germania L. I. Co.*, 110 N. Y. 266; and note, 17 Abb. N. C. p. 21. *Fowler* v. *Butterly*, 78 N. Y. 68; *Lowery* v. *Erskine*, 113 N. Y. 52; Ames's "Cases on Trusts," 2d ed., p. 139, note. Assignment by the person insured in his own name of the payment to become due at his death, may be effected by a delivery of a written instrument under seal. *Matson* v. *Abbey*, 70 Hun, 475 (477); affi'd 141 N. Y. 179. If A takes out a policy payable to B, in trust for C, and delivers it to B, he cannot thereafter have the company insert a new trustee. *Butler* v. *State M. L. A. Co.*, 55 Hun, 296; aff'd 125 N. Y. 769.[1]

§ 90. **Delivery—Other choses in action.**—If represented or embodied in written instruments, as bonds, promissory notes, etc., they may be given by manual delivery thereof, even though neither endorsed nor assigned in writing; thus: *Bond and mortgage.*— *Westerlo* v. *De Witt*, 36 N. Y. 340 (345); *Hackney* v. *Vrooman*, 62 Barb. 650. And a gift of the bond (or note) carries the mortgage. *Green* v. *Hart*, 1 Johns. R. 580; *Runyan* v. *Mersereau*, 11 Johns. R. 534; *Thomas* v. *Fuller*, 68 Hun, 361. And in *Caufield* v. *Davenport*, 75 Hun, 541, it is held that if the intent is proved, a delivery of the mortgage (the incident) will carry the bond (the principal), distinguishing *Merritt* v. *Bartholick*, 36 N. Y. 44. *Judgment.*—*Mack* v. *Mack*, 3 Hun, 323. *Promissory note of a third party.*— *Westerlo* v. *De Witt*, 36 N. Y. 340 (345); *Bedell* v. *Carll*, 33 N. Y. 581; *Fulton* v. *Fulton*, 48 Barb. 581 (592.) In *Thomas* v. *Fuller*,

[1] As to creation of a trust by an infant beneficiary under a policy, in the proceeds to be received upon the death of the insured, see the peculiar case of *Levin* v. *Ritz*, 17 Misc. 737.

68 Hun, 361, the donor held the note of a third party, which the donee had assumed and agreed to pay, and to secure which the donee had executed and delivered to the donor a mortgage on land. It was held that a delivery of the note to the donee as a gift also discharged the mortgage. Also *Langworthy* v. *Crissey*, 10 Misc. 450, and cases there cited. *Lottery ticket.*—*Grangiac* v. *Arden*, 10 Johns. R 293. *Bonds.*—*Trow* v. *Shannon*, 78 N. Y. 446. *When invalid.*—*Young* v. *Young*, 80 N. Y. 422. But the mere registration of bonds by the owner in the name of another, without delivery, is insufficient. *Matter of Crawford*, 113 N. Y. 560. In *Young* v. *Young*, 80 N. Y. 422 (440) there is a bare suggestion that a remainder in a chattel might perhaps be created and given by the donor's carving out a life estate for himself and transferring the remainder to the donee directly by delivery of a deed of gift, and this suggestion seems to meet with a certain degree of approval in *Durland* v. *Durland*, 83 Hun, 174. Compare *Matter of Wirt*, 5 Dem. 179.

If the chose in action is not represented by a tangible evidence of ownership, as the right of a depositor to draw against a bank of deposit, a debt owing from the donee to the donor, a contingent estate in expectancy (*Ham* v. *Van Orden*, 84 N. Y. 257 [269, 270]), etc., other forms of delivery must of course be permitted. "It is upon legal and equitable principle clear that a person *sui juris* acting freely, fairly, and with sufficient knowledge ought to have, and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, *whether capable or incapable of manual delivery*, *whether in possession or reversionary*, or howsoever circumstanced." *Kekewich* v. *Manning*, 1 DeG. M. & G. 187; *Riker* v. *Curtis*, 17 Misc. 134 (136) and cases cited. Thus: *Debts.*—A creditor may make a gift to the debtor of the claim by delivering a receipt (*Gray* v. *Barton*, 55 N. Y. 68; *Beaver* v. *Beaver*, 117 N. Y. 421 (428, 429), or by endorsing, upon a contract binding the donee to pay money to the donor, a receipt (*Ferry* v. *Stephens*, 66 N. Y. 321); or, it has been held, by directions to a book-keeper, to credit the debtor on the creditor's books, a loose memorandum to that effect, and notice to the debtor (see *Maclay* v. *Robinson*, 91 Hun, 630); or a mortgagee may give to the mortgagor even a part of

the debt represented by the mortgage by delivering a receipt for that amount to the mortgagor (*Carpenter* v. *Soule*, 88 N. Y. 251); or by delivering a duly executed release. *Kennedy* v. *Strobel*, 77 Hun, 96. So where A holds funds belonging to B, the latter may give them to A by delivering a receipt. So if a creditor procure a note from the debtor payable to a third party, and deliver it to the latter, *Reed* v. *Reed*, 52 N. Y. 651, it is a valid gift; so if he take the note payable to himself and the donee jointly, the presumption is that donor intends the donee to have the note after donee's death. *Sanford* v. *Sanford*, 45 N. Y. 723 (doubted 2 Redf. 254, but cited 113 N. Y. 58, and dictum to the same effect 55 N. Y. 630). *Ante*, § 87 (*c*) and (*d*). In *Brown* v. *Blackman*, 71 Hun, 356, where a father bought a bond and mortgage, and took the assignment in the name of his daughter and had it recorded; and delivered the bond, mortgage, and assignment to a third party to hold under a revocable trust for the daughter; and later took from the daughter a receipt for the amount of the mortgage, in satisfaction of the proposed trust, it was held that this constituted a gift to the daughter of the bond and mortgage, the assignment of which stood recorded in her name. It will be seen that the father delivered nothing at all to the daughter directly. The decision might be supported on the theory that such delivery was unnecessary because the recorded assignment already stood in the daughter's name, and delivery had already been made to the trustee for her benefit; and that the taking of the receipt, which accepted the gift in lieu of the trust provision, abrogated the trust and left the bond and mortgage in the custody of the third party as a mere holder thereof on behalf of the donee.

§ 91. **Deposits in bank.**—Delivery of donor's own check on a bank of deposit, payable at a future day, does not *per se* perfect a gift. *Curry* v. *Powers*, 70 N. Y. 212; *Matter of Smither*, 30 Hun, 632; *Harris* v. *Clark*, 3 N. Y. 93 (110). Though if accepted it would be binding on the maker. *Id.* But as to a gift of a check and an oral assignment to the donee of the portion of the fund represented, see *Risley* v. *Phenix Bank*, 83 N. Y. 318; *Alger* v. *Scott*, 54 N. Y. 14; and dissenting opinion of Earl, C.; *Pickslay* v. *Starr*, 149 N. Y. 432 (438); *Brill* v.

Tuttle, 81 N. Y. 454; *Tallman* v. *Hoey*, 89 N. Y. 537.[1] In *Pickslay* v. *Starr*, 149 N. Y. 432 (438) it is said that the delivery of donor's own check completes the gift *inter partes;* but there it had in fact been cashed by the donee. Compare *Dinley* v. *McCullagh*, 92 Hun, 454. As to gift of a check drawn by a third party, see *Matter of James*, 146 N. Y. 78 (95). Other methods of delivery may sometimes suffice, as of bonds, by placing them in a locked box, affixing the name of the donee, giving to the donee the key, and depositing the box in a bank; *semble*, if intent to give is shown. *Shuttleworth* v. *Winter*, 55 N. Y. 624. And *all choses in action* may, it seems, be given by delivery of a *deed of gift*. *Matson* v. *Abbey*, 70 Hun, 475 (477); aff'd 141 N. Y. 179; *Wade* v. *Holbrook*, 2 Redf. 378. See *Mercantile Deposit Co.* v. *Huntington*, 89 Hun, 465. Thus, four sums of money were owing to one who assigned them by deed with power to sue for the debts and give receipts. A schedule enumerated the debts, names of debtors, and dates of four bills of sale held as security. The deed contained no express assignment of the bills of sale or the goods conveyed by them, and nothing but the deed was delivered. This was held a good gift as against donor's executors, who had meanwhile collected; as to the liability of the donor, if living, *quœre*. *In re Patrick*, L. R. (1891) 1 Ch. 82. See also *Grymes* v. *Hone*, 49 N. Y. 17 (22); and *post*, § 101.

§ 92. **Invalid delivery** is illustrated in the following cases relating to bond and mortgage: *Matter of Wirt*, 5 Dem. 179; carriage, horses, furniture: *Delmotte* v. *Taylor*, 1 Redf. 417; *Huntington* v. *Gilmore*, 14 Barb. 243. Delivery of the donor's own note as an executory gift is invalid. *Harris* v. *Clark*, 3 N. Y. 93 (113); *Fink* v. *Cox*, 18 Johns. R. 145; *Holmes* v. *Roper*, 141 N. Y. 64.

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[1] In connection with these and other cases cited, the distinction is to be observed between a voluntary equitable assignment, made by one possessing the legal title, and insufficient to transfer the dominion (*Tallman* v. *Hoey, supra; Alger* v. *Scott*, 54 N. Y. 14), and a voluntary assignment by one who holds only an equitable title, but gives all he has so as to transfer to the donee the same dominion, according to the nature of the title, and as against third parties, which he himself had (*Kekewich* v. *Manning*, 1 Deg., M. & G. 176, 199; *Ham* v. *Van Orden*, 84 N. Y. 257; *Ridden* v. *Thrall*, 125 N. Y. 572, 577).

§ 93. **Delivery to third person** for the donee is sufficient. *Moir* v. *Brown*, 14 Barb. R. 39 (44, 45); *Gilchrist* v. *Stevenson*, 9 Barb. R. 9 (13); *Hunter* v. *Hunter*, 19 Barb. R. 631; *Matter of Hall*, 16 Misc. 174; and thereupon goes into effect, though the donor die before delivery to the donee personally. *Matter of Hall*, 16 Misc. 174 (180), and cases cited. And delivery may be made by an agent of the owner. But in such a case the owner is not bound by the terms of a receipt taken without authority by the agent. Thus, where A intended to deposit property with B, reserving his own control and power to resume, but proposing, in case of financial disaster, that it should then be held in trust for A's children; and A's agent, in delivering to B, took back a receipt stating merely that the property was held in trust for A's children, it was held that this did not create a trust as against A. *Meiggs* v. *Meiggs*, 15 Hun, 453.

§ 94. **Donor's admission** of delivery is admissible to prove the nature of the acts in question. *Grangiac* v. *Arden*, 10 Johns. R. 293; *Matter of Wachter*, 16 Misc. 137; but is rebuttable, *Hoar* v. *Hoar*, 5 Redf. 637.

§ 95. **Acceptance** by the donee is essential, but is presumed if beneficial. *Beaver* v. *Beaver*, 117 N. Y. 421 (429); *Matson* v. *Abbey*, 70 Hun, 475; aff'd 141 N. Y. 179. Acceptance by a trustee may be inferred from his conduct. *Green* v. *Green*, 4 Redf. 357.

§ 96. **Notice by trustee to debtor.**—If a claim is assigned in trust, the trustee, in order to protect his right to collect, must notify the debtor of the assignment. *Heermans* v. *Ellsworth*, 64 N. Y. 159.

(5) *Consideration.*

§ 97. **Introductory.**—If an owner of property, real or personal, wishes to part with his interest in it, he may adopt any one of four methods (*Milroy* v. *Lord*, 4 DeG. F., and J. 264 [besides a disposition by will]): (*a*) He may sell it to a purchaser for value. This case may or may not involve a trust. *West-*

lake v. *Wheat*, 43 Hun, 77 (80). Bispham on Equity, § 66. For ordinarily, when property is sold, it is transferred to the purchaser as beneficial owner; but if desired, the seller may, instead of transferring it to the purchaser, declare that he holds it in trust for a designated beneficiary, or may transfer it to the purchaser in trust for another; or to some other person in trust for the purchaser or a third party, etc. But the distinguishing feature of this class is the payment of a valuable consideration. (*b*) He may transfer it, without consideration, directly to a donee as a gift. (*c*) He may transfer it, without consideration, to a donee in trust for the benefit of a third party. (*d*) He may, without consideration, declare that he himself holds it in trust. In all these cases, one essential element in the devolution of ownership is an *intent* to sell (or exchange), to give, or to create, or declare a trust, as the case may be; a second essential is, in declarations of trust, an unequivocal and final *declaration* (*Barry* v. *Lambert*, 98 N. Y. 300 [306 and cas. cit.]), or in all the other cases a *delivery*.[1]

The first of the four classes just mentioned involves a valuable consideration. The last three are, as the term is, voluntary. In all cases of trusts, if the transfer or declaration is such as to intentionally and completely divest the transferror individually of dominion over the property, and to vest the absolute dominion in the transferree, or (in the case of a declaration of trust) in the declarant as trustee, then the transaction is complete and valid regardless of the absence of consideration. For the fact that a gift, or gift in trust, or declaration of trust, whether of real or personal property, if otherwise complete, is "voluntary," and without consideration, has, in the absence of fraud, no effect on its validity. *Baird* v. *Baird*, 145 N. Y. 659 (666); *Van Cott* v. *Prentice*, 104 N. Y. 45 (52); *Bliss* v. *West*, 58 Hun, 71 (75); aff'd 132 N. Y. 589; *Young* v. *Young*, 80 N. Y. 422 (437); *Young* v. *Heermans*, 66 N. Y. 374 (381); *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135 (141); *Dygert* v. *Remerschnider*, 32 N. Y. 629 (650). Compare *Fellows* v. *Heermans*, 4 Lans. 230 (241).

[1] See, however, the cases where a note is taken, or deposit made, etc., in the joint names of donor and donee, and there is no delivery. *Ante*, § 87 (*c*) and (*d*).

§ 98. **Declarations of trust.**—In reference to declarations of trust, it is true that the Court of Appeals, in *Day* v. *Roth*, 18 N. Y. 448 (453), said that "a person in the legal possession of money or property, acknowledging a trust, becomes from that time a trustee, *if the acknowledgment is founded on a valuable or meritorious consideration.*" And the same *dictum* is to be found in other cases. *Chapman* v. *Porter*, 69 N. Y. 276 (279); *Kennedy* v. *Porter*, 109 N. Y. 526 (547). But *Taylor* v. *Kelly*, 5 Hun, 115, and *Westlake* v. *Wheat*, 43 Hun, 77, proceed on the theory that no consideration is required to establish a declaration of trust if otherwise complete. The very numerous New York cases relating to deposits by one person, in a savings bank, of his own money, in his own name, "in trust" for another, and supporting them as valid declarations of trust, if so intended, lead inevitably to the same conclusion and appear to establish it as a general doctrine beyond controversy. *Martin* v. *Funk*, 75 N. Y. 134, and cases cited, *ante*, § 87. The text writers all unite in laying down the same principle that the only question is whether the declaration has in other respects been completed with full intent, and as a final disposition; and that if so, the absence of consideration is immaterial. 1 Lewin on Trusts, pp. 67, 68; Underhill on Trusts, 43; 1 Perry on Trusts, § 96. And Professor Ames, in his "Cases on Trusts," p. 125, cites more than forty English and American cases to the same effect. There can be no doubt of the soundness of the doctrine, and the *dicta* above mentioned are probably to be understood to refer to the fact that neither transfers nor declarations, *if defective*, can be rendered perfect or enforced as against the alleged creator or declarant, unless based on consideration. *Post*, § 99. See also 1 Am. Law Mag. 96.

§ 99. **Defective transfer—Consideration.**—For it may chance that the transfer or declaration, though intended to be effectual, is legally defective in some particular, or is purely executory, so that the complete dominion over the property involved has not in fact been shifted or the trust capacity has not been actually assumed, as proposed, and the transferror or declarant may refuse to remedy the defect or render the gift executed. In such a contingency the bearing of the presence or absence of considera-

tion upon the right of the transferee or beneficiary to compel the transferror or declarant to remedy the defect becomes of vital consequence. For such relief must, of course, be sought in equity. And it is well established that equity will grant such relief against the owner in favor of those only who have given a consideration and not in favor of mere volunteers. 1 Perry on Trusts, § 100 ; Bispham on Equity, § 66. *Warriner* v. *Rogers*, L. R. 16 Eq. 340 (348).

The reason of the rule is this : that if the owner has chosen legally to divest himself of personal dominion over the property, even without consideration, or to finally and formally acknowledge that he holds in trust, the other party, in the nature of the case, has no need to call on equity to compel the owner to do anything further to complete the transaction ; on the facts assumed the owner has already done all necessary acts, and the transaction, so far as he is concerned, is closed, and his beneficial interest is gone. But if some essential act on his part has been omitted, the result is that, no matter what his intention was, he has not divested himself of dominion or beneficial interest ; and if no consideration has passed, he is still owner in all senses as much as he ever was. His defective attempt to transfer or to declare a trust is of no more force than a voluntary executory promise to give (2 Blackst. Comm., 441, 442) ; and if equity were to compel him to complete the defective transfer or declaration, or carry out his promise, it would be forcibly taking away from him his own property and giving it to another. In other words, in a voluntary transfer or declaration of trust, unless everything is done, nothing is done. *Young* v. *Young*, 80 N. Y. 422 (437). But if a consideration has been given, the case is different, for here he is only compelled to rectify his own failure to perfect the dominion of the purchaser, who has, by payment, and by the defective transfer, become equitably entitled to full control. *Young* v. *Young*, 80 N. Y. 422 (437). In the peculiar case of *Bucklin* v. *Bucklin*, 1 Abb. Ct. App. Dec. 242, it is held that a mortgage voluntarily given to a trustee, as mortgagee in trust, is executed, and that a resort to equity to foreclose it does not involve any attempt to complete the gift, but merely calls for assistance in cutting off the mortgagor's right of redemption. See *post*, § 103.

The principles already discussed apply to the case of an executory promise, enforcement of which is sought at law, as in the case of a donor's promissory note transferred to the promisee without consideration. The donee cannot maintain a suit thereon, as the note constitutes a mere promise not binding in law. *Harris* v. *Clark*, 3 N. Y. 93 (113); *Fink* v. *Cox*, 18 Johns. R. 145; *Holmes* v. *Roper*, 141 N. Y. 64.

§ 100. **First exception.**—An apparent exception exists in the case of a parol gift of land, where the donee, on the faith of the gift, enters into possession and makes substantial and permanent improvements. Here equity will sustain the title of the donee, as if based upon a valuable consideration; and this is so even though the rents received by the donee while in possession exceed his entire outlay. *Young* v. *Overbaugh*, 145 N. Y. 158. In that case, however, the action was in ejectment against the donee in possession; in other words, it was not a case where the donee was resorting to equity to secure aid in perfecting a defective gift.

§ 101. **Second exception.**—Another exception, or, rather, a case lying outside the principles above stated, exists where the transferror has done all that *he* needs to do or can do to make the transfer perfect, and has parted with his dominion; but there still remains something to be done by a *third party* before the transferee is established in all respects in the position of an owner with full possession and control in his own name. In such a case the donee may have to resort to equity for relief, not against the transferror, because there is nothing more for him to do, but against the third party. The fact that such a resort to equity is necessary does not indicate that the transfer is incomplete as between the two original parties, and accordingly the presence or absence of consideration is immaterial. *Pearson* v. *Amicable Co.*, 27 Beav. 229; an extract from the opinion of Lord Romilly being given in Ames's "Cases on Trusts," p. 139, note. "Where there is a contract only, or an imperfect gift, which requires some other act to complete it *on the part of the assignor or donor*, the court will not interfere to require anything else to be done by him. The intermediate cases alone are difficult of solution.

The question is in every case, has there been a declaration of trust, or has the *assignor* performed such acts that the donee can take advantage of them without requiring any further act to be done by the *assignor;* and, if the title is so far complete that this Court is not called upon to act *against the assignor*, it will assist the donee in obtaining the property from any person who would be treated as a trustee for him." *Donaldson* v. *Donaldson*, Kay, 711 (718). Thus, "in the case of an assignment of the equitable interest in stock standing in the names of trustees, the deed of assignment passes the whole equitable interest of the donor, and the donee may go with that deed to the trustees, and say, transfer to me the interest in this sum of stock; and I think that in such a case it would not even be necessary to make the donor a party to a suit to enforce the gift," *Id.*, p. 719, the opinion being given in full in Ames's "Cases on Trusts," p. 147; where *Ham* v. *Van Orden*, 84 N. Y. 257, and *Johnson* v. *Williams*, 63 How. Pr. 233, are cited to the same point. In *Cushman* v. *Thayer Mfg. Co.*, 76 N. Y. 365, the owner of corporation stock gave it to B, by delivering the certificate bearing an assignment and power to transfer on the books. The court sustained a suit by B against the corporation to compel it to transfer the stock to B and issue a new certificate. "That the transfer was without a moneyed consideration can make no difference, as it was otherwise valid. . . . The delivery of the certificate as between the owner and assignee, with the assignment and power endorsed, passes the entire legal and equitable title in the stock. . . ." *Id.* pp. 370 371.

There are a few cases where the courts have sustained an action by a donee against the executors of a deceased donor, to compel them to do some act to complete his legal title or to aid in its enforcement. Thus, in *Grymes* v. *Hone*, 49 N. Y. 17, where the owner of stock executed and delivered a deed of assignment of it, with a full power of attorney to effect a transfer on the books, but died without delivering the certificate, it was held that the donee might maintain an action against the donor's representatives to compel the production of the certificate and the transfer of the stock on the company's books. Compare this case with the overruled case of *Richardson* v. *Richardson*, L. R. 3 Eq. 686, where the owner of certain *promissory notes* attempt-

ed to transfer them by an assignment, sealed and delivered, but did not endorse them, and apparently did not deliver them. This was sustained on the theory of a valid declaration of trust. But that theory and decision are erroneous. *Young* v. *Young*, 80 N. Y. 422 (439). In *Allerton* v. *Lang*, 10 Bosw. 362, where the donor delivered a stock certificate, but without written assignment or power of attorney, a suit similar to that in *Grymes* v. *Hone*, *supra*, was entertained ; this Allerton case is cited with approval in *Ridden* v. *Thrall*, 125 N. Y. 572 (577), where the court say : " The general rule in England and in this country, and particularly in this State, is that any delivery of property which transfers to the donee *either the legal or the equitable title* is sufficient to effectuate a gift ; and hence it has been held that the mere delivery of non-negotiable notes, bonds, mortgages, or certificates of stock is sufficient to effectuate a gift," citing also, among other cases, *Walsh* v. *Sexton*, 55 Barb. R. 251. Such a delivery would undoubtedly authorize an action against the corporation to compel a transfer.

There is no doubt some lack of agreement among the earlier cases as to just what is needed to complete the gift (absolute or in trust), but there can be no doubt that it is now the settled doctrine that no suit can be sustained in equity against the donor or those who merely stand in his shoes to enforce the performance of any act requisite to complete the title, which the donor could and should have done at the time of the original transfer. This principle sustains all transfers of equitable titles where the donee is thereby put in a position to enforce his rights without proceeding in equity to compel further acts on the part of the donor (Perry on Trusts, §§ 68, 102), and would sustain the remarks quoted from *Ridden* v. *Thrall*, *supra*, in their full scope. Thus, if the holder of a note drawn to his order by a third person delivers it, without endorsement, to a donee, the latter, though taking only an equitable title, may sue the maker of the note at law. *Westerlo* v. *De Witt*, 36 N. Y. 340 (345) ; *Van Riper* v. *Baldwin*, 19 Hun, 344 ; aff'd 85 N. Y. 618.

This principle is also harmonious with *Kekewich* v. *Manning*, 1 De G., M. & G. 176 (199), where the owner of an equitable future interest transferred it, thereby transferring all she had—an

equitable title. Afterward, coming into the legal title, she was held to be a trustee thereof for the donee.

In cases not falling within the scope of these exceptions, and where the transfer is defective, the presence or absence of consideration is controlling on the question of equitable relief against the transferror to make the gift complete.

§ 102. **"Valuable" and "good" consideration.**—It is, therefore, necessary, in cases of defective transfer or declaration, to determine what sort of consideration it is that will entitle the other party to relief in equity as against the transferror or declarant, to compel him to cure the defects. This must be *valuable*, as distinguished from *good* or *meritorious* consideration. For example, if one makes a defective gift to his own child, or a defective voluntary transfer to a trustee, or a defective voluntary declaration of trust for its benefit, the donee has no more standing in equity to compel him to duly complete the gift or constitute the trust than a stranger would. *Matter of James*, 146 N. Y. 78 (94); *Whitaker* v. *Whitaker*, 52 N. Y. 368. The principle is the same, whether the case is one of a mere executory promise, or an attempted transfer or declaration intended to operate *in presenti*, but failing through some defect. "It has been said that there are exceptions, and that they stand upon special grounds, such as the interference of courts of equity in favor of settlements upon a wife and child for whom the party is under a natural and moral obligation to provide. But although the doctrine in favor of such exceptions has been maintained by highly respectable authorities, yet it must be now deemed entirely overthrown by the weight of more recent adjudication, in which it has been declared that the court will not execute a voluntary contract, and that the principle of the court to withhold its assistance from a volunteer applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement." Story, Eq. Jur. § 433. *Fink* v. *Cox*, 18 Johns. R. 145, and cas. cit.; *Jefferys* v. *Jefferys*, 1 Cr. & Ph. 138 (141); *Holloway* v. *Headington*, 8 Sim. 324.

"The same rule is applied to imperfect gifts not testamentary, *inter vivos*, to imperfect voluntary assignments of debts and other property, to voluntary executory trusts, and to voluntary

defective conveyances." Story, Eq. Jur., § 793 *a*, *b*; § 987. *Antrobus* v. *Smith*, 12 Ves. 39 (43). Thus, in *Duvoll* v. *Wilson*, 9 Barb. R. 487, an owner, in consideration of natural love and affection, executed a deed which contained a covenant against incumbrances. In fact, the premises were subject to a mortgage. It was held that the grantees could not maintain an action against the grantor to compel payment of the mortgage. The distinction taken was that the consideration was sufficient to support a deed or executed contract, but did not render obligatory a promise, executory agreement, or covenant. In *Dillon* v. *Coppin*, 4 Myl. & Craig, 647, a father, by deed, had conveyed certain freehold estates, for the benefit of his daughter, and by the same deed also transferred certain East India stock, and shares in an insurance company. By the East India charter, stock could only be transferred by an entry in the books in a particular form; and the shares in the insurance company were also, by the articles of the company, to be transferred at the office of the company only. A bill was filed, after the father's death, by some of his children to set aside the deed, so far as it purported to convey the East India and insurance stock. The transfer of the stock by the deed was held defective, and the deed in that regard inoperative and void, the consideration of love and affection not being such as in equity to cure the defect found. Bispham, in his "Principles of Equity," says, § 69: "It was decided by Sugden, when Lord Chancellor of Ireland, that the meritorious consideration of blood was sufficient to set the court in motion for the purpose of enforcing an executory trust. But this decision was not followed in England; and the doctrine must be considered as settled the other way, so far as that country is concerned. . . . In New York there is a dictum that a meritorious consideration would be sufficient" (citing *Hayes* v. *Kershow*, 1 Sandf. Ch. 261); but that case was criticised and disapproved in *Duvoll* v. *Wilson*, 9 Barb. R. 487 (492), and the contrary doctrine is now well established. *Matter of James*, 146 N. Y. 78 (94). In *Re Breton's Estate*, L. R. 17 Chan. Div. 416, Breton, intending to give his wife certain furniture, plate, etc., on several occasions handed her papers describing the same, and stating that he "hereby" gave them to her. It was held that the gifts were defective for want of delivery. "But in

truth, . . . whether a wife or a stranger be the object of the gift, it is manifest from the transaction, taken by itself, that the alleged donor was mistaken as regards the proper and legal mode of effectuating that which he intended to do."

In *Price* v. *Price*, 14 Beav. 598, the court says: "It is true that Lord Thurlow, in *Colman* v. *Sarrel*, 1 Ves. Jr. 50, says: 'Whenever you come into equity to raise an interest by way of trust, there must be a valuable consideration, or, at least, what a court of equity calls a meritorious consideration, such as payment of debts or making provision for a wife or child.' This, if taken literally, is, I think, inaccurately stated, because, if the relation of trustee and *cestui que trust* be clearly established, the court will act upon it, although there was no consideration at all; but if it be meant by this passage that instruments importing a gift are considered in a different point of view when there is a meritorious consideration than when there is none at all, or, in other words, that a voluntary gift by a man to his creditors or to his wife or child is to be regarded on different principles from one to a stranger, I am unable to discover on what principle such a proposition can properly rest; nor can I find it supported by any of the decided cases." In Lewin on Trusts, 3d ed. p. 95 *et seq.*, quoted in 1 Perry on Trusts, 4th ed. p. 109 *et seq.*, note, it is said that "It is clear that an agreement founded on meritorious consideration will not be executed as against the settlor himself. *Antrobus* v. *Smith*, 12 Ves. 39. Indeed, relief in such a case would offend against the security of property; for if a man improvidently bind himself by a complete alienation, the court will not unloose the fetters he hath put upon himself, but he must lie down under his own folly. *Villers* v. *Beaumont*, 1 Vern. 101. But if the court interpose where the act is left incomplete, what is it but to wrest property from a person who has not legally parted with it? Another observation that suggests itself is, that during the life of the settlor the ground of the meritorious consideration scarcely seems to apply," etc. This doctrine is well settled in New York. *Young* v. *Young*, 80 N. Y. 422 (437); *Matter of James*, *supra*; *Whitaker* v. *Whitaker*, *supra*; *Duvoll* v. *Wilson*, *supra*.

Of course, if "marriage" is relied on as consideration, there is an important distinction between an *existing marriage relation*,

which is insufficient in the present connection, and the procuring of a marriage by the grantor with the grantee, in reliance upon the attempted or promised transfer. Here the proposed transferee, having married the proposed grantor on the faith of his undertaking, can compel the completion of it. *De Barante* v. *Gott*, 6 Barb. R. 492 ; *Johnston* v. *Spicer*, 107 N. Y. 185. And on the general subject see an article on " Formation and Validity of Voluntary Trusts," by Simon Greenleaf Croswell, in 18 Am. L. Rev. 379.

It has been suggested that a defective voluntary *trust* might stand upon a different footing from a defective voluntary *gift*, in that the acceptance of the trust by the trustee might serve as a consideration. But, as already seen, no such distinction is recognized by the courts. *Anthony* v. *Harrison*, 14 Hun, 198 (215), aff'd 74 N. Y. 613 ; *Colton* v. *Graham*, 2 So. West Rep. 647 ; *Dening* v. *Ware*, 22 Beav. 184 ; *Tatham* v. *Vernon*, 29 Beav. 604.

§ 103. **Defective transfer—Seal.**—If a conveyance *inter vivos* is relied on to prove the creation of a trust in real property, the seal has heretofore of course been essential to the passing of legal title. 1 R. S. 738, § 137 ; L. 1892, chap. 677, § 13. *Todd* v. *Eighmie*, 4 App. Div. 9. (As to this, notice Real Prop. L., § 208, which went into effect October 1st, 1896, and which omits the reference to a seal which was found in the former law.) And its absence, when required at all, would appear to constitute such a defect, in the case of a voluntary transfer, as to preclude any assistance from equity to perfect it. See *Wendell* v. *Wadsworth*, 20 Johns. R. 659 (662) ; *Grandin* v. *Hernandez*, 29 Hun, 399 ; *Todd* v. *Union Dime Savings Inst.*, (20 Abb. N. C. 270, note), 118 N. Y. 337, s. c. 128 N. Y. 636. But if a seal, whether in the given case requisite or not, is in fact present, but the transaction is in other respects defective, it remains to be considered whether the presence of the seal on the instrument is so far conclusive of the receipt of consideration by the transferror as to entitle the transferree to relief in equity against the transferror, under the principles already discussed. At common law, the general rule was that a seal was conclusive evidence of consideration.[1] *Anthony* v. *Harrison*, 14 Hun, 198, aff'd 74 N. Y.

[1] " It has often been said that a seal imports a consideration, as if a consid-

613. The New York Revised Statutes (2 R. S. 406, § 77) modified this rule to some extent by making a seal upon an instrument *presumptive* evidence of a consideration in a suit (or counterclaim) based thereon. See the summary of this section in the "Appendix" submitted to the Legislature in January, 1876, by the commissioners to revise the statutes, as printed in Throop's Code, edition of 1879, p. 734. In 1877 this provision was further modified, and appeared as § 840 of the Code of Civil Procedure, which is as follows: "A seal upon an *executory* instrument, hereafter executed, is only presumptive evidence of a sufficient consideration, which may be rebutted, as if the instrument was not sealed." The purpose of this change and the meaning of the new phraseology are explained, though somewhat ambiguously, by Mr. Throop, in a note to this section, in his edition of the Code, which concludes as follows: "The only cases where a seal should be conclusive are those saved [which means excluded] by the word 'executory' in this section, such as releases," etc. As to its conclusiveness in releases, see *Torry* v. *Black*, 58 N. Y. 185 (190). In the absence of any recognized definition of the precise term "executory instrument," it may perhaps be assumed that the adjective has the same meaning as in the term "executory contract," where it refers to the fact that something yet remains to be done before the transaction covered by the contract is concluded. See *Bender* v. *Bender*, 88 Hun, 448; *Baird* v. *Baird*, 81 Hun, 300, aff'd 145 N. Y. 659. If this be so, then an imperfect transfer being in effect nothing more than an agreement to perform the intended act, is executory in the sense of this statute, and accordingly the seal would appear not to be conclusive of consideration. *Baird* v. *Baird*, 145 N. Y. 659 (665); *Anthony* v. *Harrison*, 14 Hun,

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eration were as essential in contracts by specialty as it is in the case of parol promises. But it is hardly necessary to point out the fallacy of this view. It is now generally agreed that the specialty obligation, like the Roman *stipulatio*, owes its validity to the mere fact of its formal execution." "The framers of the New York statute, 2 Rev. Stat. 406, § 77, seem not to have discriminated between the failure of an expected consideration, and the absence of a consideration. By making the seal 'only presumptive evidence of a sufficient consideration which may be rebutted,' they not only let in an equitable defence at law, but also abolished gratuitous sealed obligations altogether." Professor Ames, in 9 Harv. L. Rev. 49, and 53 note.

198 (215), aff'd 74 N. Y. 613; *Parkhurst* v. *Higgins*, 38 Hun, 113. Thus, if one make a gift to another of the donor's own bond, this, being executory, and a mere promise, is incomplete as a gift regardless of the presence of the seal. *Matter of James*, 146 N. Y. 78 (94). So with the case of a mortgage. *Baird* v. *Baird*, 145 N. Y. 659. Compare *Bucklin* v. *Bucklin*, 1 Abb. Ct. App. Dec. 242 (247). And see 1 Perry on Trusts, § 111. As to the effect in equity of the delivery of an instrument purporting to convey land, but not sealed, see *Wendell* v. *Wadsworth*, 20 Johns. R. 659 (662); *Grandin* v. *Hernandez*, 29 Hun, 399; *Todd* v. *Union Dime Savings Inst.*, 118 N. Y. 337, s. c. 128 N. Y. 636; *Barnard* v. *Gantz*, 140 N. Y. 249; *Town of Solon* v. *Williamsburgh Savings Bank*, 114 N. Y. 122 (134). A seal is not necessary in a will. *Matter of Dietz*, 50 N. Y. 88.

§ 104. **Defective transfer—Recital of consideration.**—This will not suffice as a basis for equitable relief, where the defective transfer or executory obligation is in fact voluntary, for the recital of the consideration clause may, it seems, be rebutted. *Baird* v. *Baird*, 145 N. Y. 659 (665) and cases there cited. *Anthony* v. *Harrison*, 14 Hun, 198 (209), aff'd 74 N. Y. 613; *Vanderbilt* v. *Schreyer*, 91 N. Y. 392 (399); *Parkhurst* v. *Higgins*, 38 Hun, 113. But see the peculiar case of *Bucklin* v. *Bucklin*, 1 Abb. Ct. App. Dec. 242 (247); and *Fuller* v. *Artman*, 69 Hun, 546, correctly decided, but not on the ground stated, which is not supported by the authorities on which it relies, all of which relate to executed, not executory, instruments.

§ 105. **Defective acknowledgment.**—No conveyance can be recorded unless acknowledged or proved. Real Prop. L., §§ 241–243; Penal Code, § 164. But acknowledgment or proof is not essential to pass the title, legal and equitable. How far equity could intervene in such a case to compel a voluntary grantor to acknowledge the deed has not been passed on.

§ 106. **Defective gift not a valid declaration.**—As above stated, a voluntary attempted transfer, either as a direct gift or as a gift in trust, fails if there is not a complete delivery suffi-

cient in itself to pass the title. In such cases an attempt has frequently been made to sustain the defective gift on another theory, namely, as a declaration of trust. If, it has been claimed, there was an evident intention to transfer, and if the giver believed that his acts were sufficient to, and did, transfer, and if, unfortunately, his intention was frustrated by defective delivery, so that in fact he still retained title, his intention should receive effect by construing his acts as a declaration that he held in trust; in that case, delivery not being necessary, the difficulty would be removed. To this claim it has been answered that an intent to give is not a declaration that the owner holds in trust; it is, instead, a declaration that he does not intend to hold at all, either in trust or otherwise. *Beaver* v. *Beaver*, 137 N. Y. 59 (65). And such is now the well-settled rule. If one makes a defective gift, beneficial or in trust, of real or personal property, the courts cannot turn it into something entirely different, and hold him to something he never intended. *Wadd* v. *Hazelton*, 137 N. Y. 215; *Young* v. *Young*, 80 N. Y. 422; *Beaver* v. *Beaver*, 137 N. Y. 59; s. c. 117 N. Y. 421; *Curry* v. *Powers*, 70 N. Y. 212 (219); *Matter of Gallagher*, 1 App. Div. 65. In the same way, if he makes a defective declaration, it cannot be deemed a valid transfer of title. The particular intent and the corresponding act must concur. *Beaver* v. *Beaver*, 137 N. Y. 59. In *Govin* v. *De Miranda*, 79 Hun, 286 (compare the cases of the same name, 140 N. Y. 474; 79 Hun, 329; 140 N. Y. 662; 76 Hun, 414; and 9 Misc. 684) the foregoing principle seems to have been carried to an extreme, the court refusing to sustain the theory of a declaration, though it was in writing and stated that the writer held the certificates "as the trustee" for the other party. See *ante*, p. 39.

CHAPTER III.

THE TRUSTEE.

(1) *Who may be a Trustee.*

§ 107. **Introductory.**—The only provisions of law bearing on the capacity of any natural person to be the trustee of an express trust are such as affect it indirectly. Thus, a trustee of land must have the legal title, and if any one is debarred by law from holding the legal title to land in this State, it follows that he cannot be the trustee of an express trust in real property. Real Prop. L., § 2. There are also provisions, hereafter to be considered, which give the courts authority to remove persons from the office of trustee, under certain circumstances, but their bearing on the present question is also indirect, as they relate rather to the right to *continue to act* as trustee than to the capacity to become such. There is a class of artificial persons—that is, corporations—which cannot be trustees unless specially so empowered in their charters, or by way of necessary incident to the powers and rights given, the reason for which is that, being artificial, and existing only under a special grant of life and powers, they can neither acquire property nor exercise functions except in accordance with the limited laws of their being. *Jackson* v. *Hartwell*, 8 Johns. R. 422; *Fosdick* v. *Town of Hempstead*, 125 N. Y. 581 (590, 593, *et seq.*); Fowler, Char. Uses, 116. Trust companies are by special act authorized to act as trustees. Banking Law, L. 1892, chap. 689, §§ 157, 163; 1 Birds. R. S. 2d ed., pp. 229, 231. For other illustrations, see Fowler, Char. Uses, 117, 118. All other persons—married women, infants, lunatics, drunkards, non-residents, illiterates, irresponsible persons—may have title vested in them in trust. So with "religious persons" who have renounced the world. 1 Perry on Trusts, § 57. As to insolvent persons, see *Id.*, § 58.

The question, as to some of these, whether they should be allowed to continue as trustees, is discussed under the head of "Removal of Trustees," *post*, § 344 *et seq.*

§ 108. **Infant.**—As already stated, infancy does not interfere with the vesting of title in trust. An infant trustee who ought to convey will be compelled to do so by the court, and the deed of conveyance is executed by its guardian. *Anderson* v. *Mather*, 44 N. Y. 249 (261). 1 R. L. 148, § 7, now repealed. This principle of the law was continued in the Revised Statutes (2 R. S. 194, § 167), and is now found in Code C. P., §§ 2345–2347, which apply also to trustees who are lunatics, idiots, or habitual drunkards. And accordingly, if an infant trustee ought to convey, and does convey, it follows that he cannot afterward disaffirm his act as he might in regard to a conveyance of his own property. *Zouch* v. *Parsons*, 3 Burr. 1801; *Elliott* v. *Horn*, 10 Ala. 348; *Tucker* v. *Moreland*, 10 Pet. 67; *People* v. *Moores*, 4 Den. 518. Infancy may, however, be ground for removal of the trustee and the substitution of a competent person.

§ 109. **A married woman** may, and frequently does, act as trustee of real and personal property, however the trust may be created and irrespective of the character of the trust.

§ 110. **Alien—Real property.**—In reference to aliens, the prior statutes (collected in the first edition of Birdseye's R. S., p. 2518, *et seq.*, and also L. 1893, chap. 207, relating to a certain class of non-resident aliens) have been repealed by the Real Property Law, § 300, which went into effect October 1st, 1896, except that the former provision in 2 R. S. 57, § 4 relating to devises to aliens was left standing. This provides that "every devise of any interest in real property to a person who, at the time of the death of the testator, shall be an alien, *not authorized by statute* to hold real estate, shall be void. The interest so devised shall descend to the heirs of the testator; if there are no such heirs competent to take, it shall pass, under his will, to the residuary devisees named, if any there be competent to take such interest."

By the common law, as in force in New York prior to the

statutory regulation, an alien might take land by purchase (using the word purchase in its broad meaning as including all titles except such as are acquired by descent or by mere operation of law), and the title so acquired would be good except as against the State. *Hall* v. *Hall*, 81 N. Y. p. 134; 2 Kent, Comm. 54; *People* v. *Conklin*, 2 Hill, 67. This general rule was not changed by the Revised Statutes except in the single case provided for by 2 R. S. 57, § 4, *supra*; *Hall* v. *Hall*, *supra*, in which the whole subject is elaborately discussed. See also *Wadsworth* v. *Wadsworth*, 12 N. Y. 376; *Wright* v. *Sadler*, 20 N. Y. 320; *Mooers* v. *White*, 6 Johns. Ch. 360; reviser's note, 2d ed. Rev. Stat., Vol. V., p. 366; *Goodrich* v. *Russell*, 42 N. Y. 177; *Luhrs* v. *Eimer*, 80 N. Y. 171. As to the bearing of the alienism of the trustee, see *Marx* v. *McGlynn*, 88 N. Y. 357 (376); *Duke of Cumberland* v. *Graves*, 7 N. Y. 305; *Lane* v. *Lewis*, 4 Dem. 468; *Howard* v. *Moot*, 64 N. Y. 262.

In cases where land could be vested in trust in an alien able to hold except as against the State, here, upon office found, the land would vest in the State, *subject*, in one sense, to the trust—that is, the trust would theoretically still exist, but there was no legal method of enforcing it against the State. *Pimbe's Case*, Moore, 196. Cruise, "Uses," 47. If, however, the State then grants the land to a stranger, the obstruction disappears, and, the trust still existing, the rights of the beneficiary may be enforced. *Winona* v. *St. Paul Co.*, 26 Minn. 179; *Pinson* v. *Ivey*, 1 Yerg, 296; *Marshall* v. *Lovelass*, Cam. & Nor. 217 (these and other citations on this point being derived from Ames's "Cases on Trusts," p. 215, note). In *King* v. *Boys*, Dyer, 283*b*, plaintiff enfeoffed A, an alien, and B, to the use of himself, etc. On office found, as to one half, "the Queen shall have the moiety by her prerogative to her own use, and the other use in this moiety is gone forever." Also *Fish* v. *Klein*, 2 Mer. 431.

A testamentary trustee may be removed by the surrogate on any ground which would require the refusal of letters testamentary to one named as executor in a will. Code C. P., § 2817. One of these grounds is that the executor is an alien not resident in New York. Code C. P., § 2612. Accordingly, if a testamentary trustee is an alien and not resident in New York, he may

on this ground be removed by the surrogate and a successor appointed. *Lane* v. *Lewis*, 4 Dem. 468.

It is to be noticed that 2 R. S. 57, § 4, relates only to devises, and has no bearing on grants. A grant of land to an alien in trust, therefore, even apart from other statutes, would still give title to the trustee except (in cases where the right of the State is not also cut off) as against the State, and subject, perhaps, in a given case, to the power of the Supreme Court to remove him as an "unsuitable person." Real Prop. L., § 92.

The Real Property Law (which went into effect October 1st, 1896) did not repeal the provision, 1 R. S. 57, § 4, relating to devises to aliens, quoted *ante*, p. 69. But it repealed the other acts relating to an alien's right to take and hold land, and substituted therefor the new sections 4, 5, 6, and 7, concerning the scope of which, as compared with the laws repealed, attention is called to a letter in the *Daily Law Journal* of October 14th, 1896. See also Real Prop. L., § 294, and Mr. Birdseye's note to these sections in his second edition of the Rev. Stat., p. 2602.

§ 111. **Alien—Personal property.**—Alienage *per se* does not disqualify one as a trustee of personalty. See *Beck* v. *McGillis*, 9 Barb. R. 35. But alienage *and* non-residence constitute ground for removal, as to which see *ante*, § 110. Citizenship in another State of the Union is not alienage. *McGregor* v. *McGregor*, 3 Abb. Ct. App. Dec. 92. Bouvier's Law Dict., "Alien." And where a trustee holds a trust fund here, and removes to another State where she is incapable (*e. g.*, as being a married woman) to be a trustee, yet, the fund remaining here, her change of residence does not divest her title, and the trust can be enforced here. *Schluter* v. *B. S. Bank*, 117 N. Y. 125 (130).

§ 112. **Corporation.**—There are several senses in which a corporation may become a trustee. See *ante*, § 107. (*a*) It may by special legislative grant be empowered to act as trustee of express trusts, and to hold title as trustee to real and personal property; examples may be found in the charters of trust companies; and to such companies broad powers in this field are now given by the Banking Law. L. 1892, chap. 689, Art. IV.; Birdseye's R. S., 2d ed., p. 229, *et seq.* (*b*) It may, where at all authorized

to acquire title, take *subject* to the payment by it of legacies, annuities, etc. In *Matter of Howe*, 1 Pai. Ch. 214, testator bequeathed $4000 to St. George's Church, in trust to invest and pay the income to A for life, and thereafter to use the income for church purposes. Chancellor Walworth held that "wherever property is devised or granted to a corporation partly for its own use and partly for the use of others, the power of the corporation to take and hold the property for its own use carries with it, as an incident, the power to execute that part of the trust which relates to others." In *Currin* v. *Fanning*, 13 Hun, 458, testator devised land to Manhattan College in trust to receive the rents and apply to the use of the college, on condition that out of the rents it pay to testator's widow an annuity of $1500 a year for her life. The devise and subordinate trust were both sustained, and it was held that a corporation authorized to take and hold real and personal property may take and hold subject to the execution by it of a subordinate trust for a purpose in itself outside its charter powers. See also Perry on Trusts, § 44; *Trustees of Phillips Academy* v. *King's Executor*, 12 Mass. 564; *Vidal* v. *Girard*, 2 How. (U. S.) 127; compare *Tinkham* v. *Erie Railway Company*, 53 Barb. R. 393. The present statute (Gen. Corp. L., § 11) provides that "every corporation as such has power, though not specified in the law under which it is incorporated. . . . 3. To acquire by grant, gift, purchase, devise, or bequest, to hold and to dispose of such property as the purposes of the corporation shall require, subject to such limitations as may be prescribed by law." The previous act (2 R. S. 57, § 3), providing that "no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter, or by statute to take by devise," has not been repealed. That section relates only to the power of a corporation to take by devise at all; if a corporation is authorized so to take, this section did not attempt to limit the *purpose* for which a devise might be received, and so is consistent with the decisions above cited. *Currin* v. *Fanning*, 13 Hun, 458 (468). (*c*) A corporation of a religious, charitable, benevolent, etc., character, in one sense holds all its property in trust. But in legal contemplation it is an absolute owner, holding outright and with full beneficial title according to its restricted and special nature. *Wetmore* v. *Parker*, 52 N. Y.

450 (460). *Post*, § 506. This sort of a trust, therefore, if so it may be called, has no bearing on express trusts. Upon the subject of corporations as trustees, see 1 Perry on Trusts, § 42.

§ 113. **United States—State.**—A devise of land to the United States Government for the purpose of discharging a certain federal debt cannot be sustained under the law of New York. The testamentary capacity given by our statutes can be exercised only in respect to natural persons and such corporations as are authorized by the law of New York to take by devise. *Matter of Fox*, 52 N. Y. 530. Neither the United States nor a State, as a political corporation, can take and hold property in trust for a charity, under the law of New York. *Levy* v. *Levy*, 33 N. Y. 97 (123), appealed to U. S. Supreme Court, see Tucker, p. 149; but appeal withdrawn, *Id.*, and p. 150. Compare *Burrill* v. *Boardman*, 43 N. Y. 254 (263), and see 1 Perry on Trusts, § 41.

§ 114. **Witness to will.**—A devise to one in trust is not affected by the fact of his being a witness to the will. He has no personal interest at stake. Nor does the fact that as trustee he will receive commissions, or a specified sum in lieu of commissions, alter the case. His commissions are not a legacy, but are payment for services rendered; and the same principle applies where he is offered as a witness to prove due execution, etc., though not a subscribing witness. *McDonough* v. *Loughlin*, 20 Barb. R. 238; *Matter of Wilson*, 103 N. Y. 374 (376); *Children's Aid Soc'y* v. *Loveridge*, 70 N. Y. 387 (392); *Rugg* v. *Rugg*, 83 N. Y. 592; *Reeve* v. *Crosby*, 3 Redf. 74; *Barnard* v. *Crossman*, 54 Hun, 53; *Matter of Chase*, 41 Hun, 203; see 23 State Reporter, 441; *In re Huestis*, 23 Weekly Dig. 224; *Matter of Burke*, 5 Redf. 369.

§ 115. **Beneficiary as trustee.**—"It is undoubtedly true that the same person cannot be at the same time trustee and beneficiary of the same identical interest. To say that he could would be a contradiction in terms as complete and violent as to declare that two solid bodies can occupy the same space at the same instant." See *Woodward* v. *James*, 115 N. Y. 346; *Rose* v. *Hatch*, 125 N. Y. 427 (431, 432). The rule that a trust will

not fail for lack of a trustee has perhaps an (apparent) exception in the case where property is left to A in trust to receive and use the income for his own benefit for life. He cannot act as trustee for himself. Therefore there is no trustee. But the court will neither itself administer nor appoint another trustee to administer the trust. For there *is no* valid trust. To make a valid trust, the trustee and beneficiary must be different people. Therefore in the case supposed, A, being entitled to possession, rents, and profits, takes an absolute estate for life. *Rose* v. *Hatch*, 125 N. Y. 427 (431, 432); *Mulry* v. *Mulry*, 89 Hun, 531 (539); *Greene* v. *Greene*, 125 N. Y. 506 (512). But this result is doubted in *Losey* v. *Stanley*, 147 N. Y. 560 (568, 569), where the question is said to be an open one.[1] But at any rate the fact that the court appoints a sole beneficiary to be sole trustee will not extinguish the trust. *Losey* v. *Stanley*, 147 N. Y. 560 (568); *Mulry* v. *Mulry*, 89 Hun, 529; *People ex rel Collins* v. *Donohue*, 70 Hun, 317 (325).

If, as to a portion of the income, the trustee is also beneficiary, and therefore, as to that portion is not trustee, but takes what is given him by a direct legal right, it does not follow that his trust estate in the corpus of the property is in any manner destroyed, or that there is any less a necessity for its existence. He can be trustee for the other beneficiaries, and that trust ranges over the whole estate for the purpose of its management and disposition. *Woodward* v. *James*, 115 N. Y. 346 (357). Compare *Ireland* v. *Ireland*, 84 N. Y. 321.

And where several trustees are named, one of whom is also a beneficiary, there is no attempt to unite in the same person the office of trustee and the interest of beneficiary. He can act freely as to other beneficiaries than himself, and as to his interest the

[1] Perhaps the decisions cited, and the doubt expressed in *Losey* v. *Stanley*, *supra*, may be reconciled thus, that a grant or devise to a person to hold in trust for himself, to receive and apply the rents to his own use, etc., where it is clear that the grantor or testator looked not so much at the establishment of the trust, in some legal form, as at the vesting of both title and beneficial interest in the person named, would be void as a trust; but that if it appears that his first and chief purpose is to constitute a valid trust, in any event, and the appointment of the beneficiary to be the trustee is a subordinate and incidental feature, appointment might be regarded as void, and the trust itself sustained. Compare *post*, § 121.

others can exercise the necessary judgment and control. *Bundy* v. *Bundy*, 38 N. Y. 410; *Wetmore* v. *Truslow*, 51 N. Y. 338; *Postley* v. *Cheyne*, 4 Dem. 492; *Cocks* v. *Barlow*, 5 Redf. 406; *Moke* v. *Norrie*, 14 Hun, 128 (132); *Mulry* v. *Mulry*, 89 Hun, 531. And although the trustees other than the beneficiary may die or decline to act, the court has power to supply their place, or, if need be, or if it choose to do so, to take upon itself the execution of the trust, so far as it ought not to be executed by the trustee who is also beneficiary. If, instead of appointing a new trustee, it exercises itself all the discretion reposed anywhere, it may then direct the performance of the resulting merely formal acts by the trustee who is a beneficiary. *Rogers* v. *Rogers*, 111 N. Y. 228 (237 *et seq.*); and see *Amory* v. *Lord*, 9 N. Y. 403 (412). Compare *Kirk* v. *Kirk*, 137 N. Y. 510 (515). And where several trustees are named, and one of them is sole beneficiary, and they are directed on the written request of the beneficiary to pay and deliver the entire trust fund to her in absolute ownership, and she alone qualifies and acts, it has been held that she may execute a written declaration of her election to take the estate absolutely, and may thus acquire the absolute ownership. *Solomons* v. *Kursheedt*, 3 Dem. 307. This conclusion would hardly appear to be inevitable as a rule.

But if the property is left to several persons as trustees, and they are also the equal and sole beneficiaries of the trust, and are vested with the remainder after the trust in equal shares, here their various titles and interests as trustees, beneficiaries, and remaindermen merge and give them the fee in possession. *Greene* v. *Greene*, 125 N. Y. 506 (510). A beneficiary who is also one of two or more trustees cannot, as beneficiary, hold her co-trustees liable for a loss of the trust fund where she is equally responsible with them for negligence resulting in the loss. *Earle* v. *Earle*, 93 N. Y. 104 (117, 118). The rule prohibiting a trustee from dealing with the trust estate to his own benefit, without the knowledge and assent of the beneficiary, applies to a case where one of several trustees, who is also one of the beneficiaries, with his co-trustees sells and conveys trust property to himself or to another for his benefit, and such a sale may be repudiated by the other beneficiaries. *Tiffany* v. *Clark*, 58 N. Y. 632.

§ 116. **Relative of beneficiary.**—The court, in appointing a trustee to fill a vacancy, may select, according to circumstances, a person not related to the beneficiary, or a relative—*e.g.*, the beneficiary's father. *Smith* v. *Smith*, 3 Dem. 556. See *Russak* v. *Tobias*, 12 Civ. Pro. R. 390 (398).

§ 117. **Creator of trust as trustee.**—In the case where the owner of property duly declares that he holds it in trust for another (a subject discussed *ante* § 63 *et seq.*), he thereby constitutes himself a trustee.

§ 118. **Relative of judge.**—It has been held that while it is inappropriate, it is not unlawful, for the court to appoint as guardian *ad litem* for an infant, or committee of a lunatic, a near relative of the judge making the order or decree. *Matter of Van Wagonen*, 69 Hun, 365; *Matter of Hopper*, 5 Pai. Ch. 489; *Underhill v. Dennis*, 9 Pai. Ch. 202. As to the clerk of the Surrogate's Court, see Code, § 2511.

§ 119. **Sheriff.**—It has been held that a valid express trust may be created by an assignment by a judgment debtor to the sheriff holding attachments against his property, in trust to pay the same. *Ditmars* v. *Smith*, 3 App. Div. 57.

(2) *Appointment of Trustee.*

§ 120. **Introductory.**—As already stated, one of the essential elements of a trust is the trustee. But this statement calls for careful examination to determine its exact meaning. The trustee may be named in the deed or will creating a trust of real or personal property. In case of a declaration, the declarant is necessarily pointed out as the trustee. If the trust is of personalty, and created by parol, either the words or acts of the creator may designate him. There are, however, numerous contingencies in which trustees are appointed by the court or by persons other than the settlor.

In cases where the court appoints, the rule regulating the necessary parties to a proceeding for appointment of a trustee has differed from that applying to a case of removal. For in a proceeding simply for the appointment of a trustee to execute trust

duties and powers, for the faithful performance of which security is always required, it has been a matter of discretion with the court, to whom notice should be given ; and the appointment made is always open to review on the application of any party interested, who was not informed of the proceedings leading to the appointment. *Matter of Robinson*, 37 N. Y. 261 ; *Tompkins* v. *Moseman*, 5 Redf. 402 (405) ; *Lane* v. *Lewis*, 4 Dem. 468 (472). But notice is now required in case of appointment by the Supreme Court under Real Prop. L., § 91, and L. 1882, chap. 185. Where there is a trust for one life, the remainder to be conveyed by the trustee as the life beneficiary shall by deed appoint, and both beneficiary and trustee have died ; but there is a paper purporting to be an appointment, and the court appoints a successor to convey as therein directed ; the person entitled in case of default in appointing, not having been a party to the proceeding to appoint a successor, may bring ejectment against the grantee of the new trustee, and attack the validity of the paper purporting to be an appointment. The fact that the trustee conveyed by order of court does not affect the plaintiff's rights. *Wainwright* v. *Low*, 132 N. Y. 313.

If it appears that a trust or power in trust in question is not a valid express trust, or power, or, if valid in its creation, that it has expired, the court will not appoint a new trustee. *Matter of Butterfield*, 133 N. Y. 473 ; *Matter of Craig*, 1 Barb. R. 33 ; *Matter of Hall*, 24 Hun, 153 ; *Campbell* v. *Low*, 9 Barb. R. 585 (594) ; *Albrecht* v. *Pell*, 11 Hun, 127 (128) ; *Jauncey* v. *Rutherford*, 9 Pai. Ch. 273 (279, 280). But it is sufficient if a *prima facie* case is made out of the existence of a trust and is not conclusively disproved. The appointment does not conclude the question whether such a trust does exist, but merely furnishes a person to enforce and protect it if it exists. *Matter of Carpenter*, 131 N. Y. 86 (87) ; *Matter of Waring*, 99 N. Y. 114 (117). And it has been held that if the trust term has expired, and nothing remains but to distribute the personalty to those entitled under the trust instrument, the proper course is for the Surrogate to direct that distribution by the executor or administrator of the deceased trustee, at any rate, in a case where the fund has been mingled with the trustee's own property, and does not exist as a distinct fund. *Graham* v. *De Witt*, 3 Bradf. 186. But

see L. 1882, chap. 185. The parties to a given litigation may be estopped by their conduct from objecting to the standing of a successor, as having been appointed without due authority. *Emerson* v. *Bleakley*, 2 Abb. Ct. App. Dec. 22 (27). The executor of a deceased trustee has no standing to question the appointment of a new trustee. *Fosdick* v. *Delafield*, 2 Redf. 392. And a trustee cannot, in order to deny his liability to account, attack the regularity of proceedings leading to his own appointment, after utilizing it to obtain the property as trustee; and his sureties are likewise estopped. *People* v. *Norton*, 9 N. Y. 176.

(a) Appointment by the Supreme Court.

§ 121. **If no trustee designated.**—Where it is said that a trustee is an essential element in a trust, the meaning is not that a trustee must be specifically named in the instrument creating the trust, nor that if named he must be living, or willing or able to act, when the trust goes into effect. The meaning is that the idea of a trust necessarily implies a person to execute the terms of the trust. It is a familiar principle that a trust otherwise valid will never be allowed to fail for lack of a trustee. *Sheldon* v. *Chappel*, 47 Hun, 59. In such a case the Supreme Court has inherent power to appoint a trustee. *Cross* v. *U. S. Trust Co.*, 131 N. Y. 330 (350); *Kirk* v. *Kirk*, 137 N. Y. 510 (515); *Dodkin* v. *Brunt*, L. R. 6 Eq. 580. It is not, therefore, strictly essential that any trustee be named or designated in the deed or will. But in order to constitute an express trust, it is essential that the provisions be such as to render a trustee necessary to carry them into effect. In the *Cross* case (*supra*), a testamentary trust was under consideration; the will had appointed the defendant corporation as trustee; the court says: "It may be doubted whether the corporate powers conferred upon the trustee in this case are broad enough to authorize it to execute a trust created as this was. The want of corporate capacity in the trustee to act would not be fatal to the trust. The proper court would not allow the trust to fail because the trustee is disabled, but would appoint a new one," citing Perry on Trusts, 4th ed. § 38. This is merely a *dictum*. It is also true that in a certain sense a trustee had been appointed. Still, the appointment, as

trustee, of a corporation, an artificial person whose powers and capacities did not enable it to act as such trustee, comes very close in principle to the omission of any specific appointment whatever. In *Kirk* v. *Kirk*, 137 N. Y. 510, the testator devised land to his wife for life, and provided that on her death the surrogate should appoint "two commissioners" to divide and allot shares, among testator's issue, and hold certain of the shares in trust to receive the rents, etc., for the respective beneficiaries. In this action for partition, on a motion to compel purchasers at a sale under the interlocutory judgment to complete their purchase (no "commissioners" and no trustee having ever been appointed), it was held, on appeal, that "the Supreme Court has inherent power to execute a trust, and in the absence of a trustee it may, and will, take upon itself its execution. It appears from the record that it has undertaken the discharge of this duty in the present case. The trustee, when appointed, will be the successor of the court in the administration of the trust," etc. Compare *Bascom* v. *Albertson*, 34 N. Y. 584, at p. 596, where a devise in trust to five persons to be appointed by the Supreme Court of Vermont was held invalid, the court saying that the gift could not vest at testator's death for lack of any trustee then named, and therefore the absolute ownership was unduly suspended (p. 596). But on pp. 591, 592, the court, in the course of discussion on another point, say: "It does not follow, from this proposition, that where there is a *valid* trust for ascertained beneficiaries, it will be permitted to fail for want of an original trustee; for, in such a case, Chancery will supply the defect in the exercise of its ordinary jurisdiction over trusts in general." In *Levy* v. *Levy*, 33 N. Y. 97 (102), in a portion of the opinion of the court concurred in by apparently only three judges, it is said: "There being a sufficient declaration of the use, and a certain beneficiary ascertained, *the presence or absence of a trustee in the limitation will make no difference*, for equity will not allow a gift to fail for want of a trustee. . . . There can be no valid trust unless there be a certain donee or beneficiary whom the law will recognize; and if there be, the use will not be defeated, *though no trustee be named*, or the trustee named be, in law, incapable of taking." The same view is adopted and expressly settled in *Dodkin* v. *Brunt*, L. R. 6 Eq. 580.

§ 122. **Upon death, before term begins,** of person named as trustee. The discussion under the preceding paragraph applies with even greater force to this case.

§ 123. **If trustee named is beneficiary.**—If the sole trustee named in the trust instrument is also the sole beneficiary, it has been said that no trust is imposed. *Rose* v. *Hatch*, 125 N. Y. 427 (431, 432); *Greene* v. *Greene*, 125 N. Y. 506 (512); *Mulry* v. *Mulry*, 89 Hun, 531 (539). But in a very recent case the point is regarded as an open one. *Losey* v. *Stanley*, 147 N. Y. 560 (568, 569). See *ante*, § 115. Also compare *ante*, §§ 115, 121.

§ 124. **In case of renunciation.**—There is no general statute providing for either renunciation by a trustee as such or the appointment of a trustee in the place of one who renounces. The power of appointment, however, exists in the Supreme Court.[1] In *Burritt* v. *Silliman*, 13 N. Y. 93, it is held that if land is devised to one in trust he cannot be compelled to accept title; that if he renounces or disclaims, in appropriate manner, the result is simply that title is not in him. So much for the principle that he may renounce. In *Dunning* v. *Ocean National Bank*, 61 N. Y. 497, a will appointed one Jennings as sole executor, and also devised land to him in a distinct capacity as sole trustee. As executor he renounced. As trustee "the evidence or findings in the present case are quite sufficient to establish the fact that Jennings never did, and never intended to, accept the trust." About ten years after probate of the will the plaintiff "was duly appointed by the Supreme Court a trustee to carry out the trusts." This suit was one that could be brought only by a trustee as such. "Until the appointment of the plaintiff by the Supreme Court, on the 28th of September, 1869, as trustee in the place of Jennings, there was no party legally existing in whom a right of action vested." Judgment in favor of plaintiff was affirmed. In *De Peyster* v. *Clendining*, 8 Pai. Ch. 295 (310), the court says that "although all the trustees named in the will have declined the trust, this court will not permit a devise

[1] As to what acts constitute sufficient basis for assumption that a trustee has *accepted* the trust, see *Green* v. *Green*, 4 Redf. 357.

in trust which is valid in other respects to fail for want of a trustee. . . . The trust devolves upon the court; and the decree must direct the appointment of a new trustee in the place of those who have declined to execute the power in trust." (Aff'd 26 Wend. 21, *sub nom. Bulkley* v. *De Peyster.*) See also *Roome* v. *Phillips*, 27 N. Y. 357 (363); *Adams* v. *Adams*, 21 Wall. 185 (191); *Mulry* v. *Mulry*, 89 Hun, 529 (539).

§ 125. **Upon death during term.**—"On the death of the last surviving or sole trustee of an express trust, the trust estate shall not descend to his heirs nor pass to his next of kin or personal representatives; but in the absence of a contrary direction on the part of the person creating the same, such trust, if unexecuted, shall vest in the Supreme Court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court, who shall not be appointed until the beneficiary thereof shall have been brought into court by such notice in such manner as the court or a justice thereof may direct." Real Prop. L., § 91.

The original statute (1 R. S. 730, § 68), for which this is a substitute, did not contain the words "next of kin," and a question arose under it which led to an additional statute which still stands unrepealed. It may, therefore, be appropriate to examine the question in relation to its bearing on the section above quoted, considered alone.

In *Hawley* v. *Ross*, 7 Pai. Ch. 103 (107) it is held that if there was any doubt that the original statute (1 R. S. 730, § 68), taken only in the connection in which it stood in the revision, was intended to apply to trusts of personal as well as of real estate, it was made applicable (in certain cases) to personalty by 1 R. S. 773, § 2, which provides that in certain respects limitations of future or contingent interests in personal property shall be subject to the rules prescribed in 1 R. S. 718–750 in relation to future estates in land. To the same effect is *Wells* v. *Wallace*, 2 Redf. 58 (62) decided in 1871. In 1867, however, in *Bunn* v. *Vaughan*, 1 Abb. Ct. App. Dec. 253 (256), it was distinctly held that 1 R. S. 730, § 68 did not apply to trusts of personalty, which, on the death of the trustee, devolved upon his personal

representative. To the same effect are *Emerson* v. *Bleakley*, 2 Abb. Ct. App. Dec. 22 (27); *Bucklin* v. *Bucklin*, 1 Abb. Ct. App. Dec. 242 (252); *Boone* v. *Citizens' Savings Bank*, 84 N. Y. 83 (87); *Wetmore* v. *Hegeman*, 88 N. Y. 69 (72); *Butler* v. *State M. L. A. Co.*, 55 Hun, 296 (301); aff'd 125 N. Y. 769. But the rule of devolution in trusts of personal property was assimilated to 1 R. S. 730, § 68, by L. 1882, chap. 185, which is as follows: "Upon the death of a surviving trustee of an express trust, the trust estate shall not descend to his next of kin or personal representatives; but the trust, if unexecuted, shall vest in the Supreme Court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court. But no person shall be appointed to execute said trust until the beneficiary thereof shall have been brought into court by such notice and in such manner as the court may direct." L. 1882, chap. 185. *Matter of Waring*, 99 N. Y. 114 (117); *Butler* v. *State M. L. A. Co.*, 55 Hun, 296 (301); aff'd 125 N. Y. 769; *Matter of Carpenter*, 131 N. Y. 86 (87); *Wilcox* v. *Gilchrist*, 85 Hun, 1 (12). This covers the case of an assignee under a general assignment for creditors. *Matter of Tousey*, 2 App. Div. 569. But it has been held that the latter statute (L. 1882, chap. 185) relates only to the case of a technical trust as distinguished from the case of duties imposed upon an executor as such, in which latter case, upon the death of the executor before distribution the property passes to and is to be distributed by the administrator, with the will annexed of the original testator. *Matter of Post*, 2 Con. 243; compare *Greenland* v. *Waddell*, 116 N. Y. 234 (242). See, further, the discussion of executorial as distinguished from trust duties, *post*, § 156 *et seq.*; § 598 *et seq.*

Each of the statutes above referred to spoke in terms only of the case of the death of "*the surviving* trustee of an express trust," or "*a surviving* trustee," and did not in terms refer to the contingency of the death of a *sole* trustee; but at least two cases, one in the Court of Appeals and one in Chancery, proceed on the theory that under these statutes a successor to a deceased sole trustee may be appointed. *Matter of Waring*, 99 N. Y. 114 (117), where the reference to the statute as § 81 of article 2,

etc., is a misprint for § 68. *Hawley* v. *Ross*, 7 Pai. Ch. 103. Compare also *Royce* v. *Adams*, 123 N. Y. 402, where it is held that Code C. P., § 2818, providing for appointment by the surrogate's court of a successor to a *sole* trustee who has died, or resigns, etc., covers also the case where several trustees die, or resign, etc. See also *Matter of Tousey*, 2 App. Div. 569. These decisions have now been embodied in the new section (Real Prop. L., § 91) above quoted, but L. 1882, chap. 185, has been left unrepealed and unamended.

In regard to the power of the Supreme Court to "appoint a trustee" under the foregoing statute, 1 R. S. 730, § 68 (and by implication the same remark applies to the foregoing L. 1882, chap. 185, and certainly to Real Prop. L., § 91), it has been said, in a unanimous opinion of the General Term for the First Department (by way of *dictum*), that no such power exists. "Upon what theory the said Andrews" (who appeared, by admission, to have been in fact appointed trustee in place of a deceased testamentary trustee, p. 245) "is called a testamentary trustee throughout the whole of these proceedings we do not understand. He was not appointed by the will of anybody [compare the definition of a testamentary trustee in Code C. P., § 2514, subd. 6] ; but the trust in the will of Mrs. Hopper having devolved upon the Supreme Court upon the death of the trustee named therein, the court, pursuant to the provisions of the Revised Statutes (1 R. S. 730, § 68), could only appoint Andrews as a person to execute the same under its direction, there being no power in the court to appoint a new trustee upon the death of a surviving trustee. It is only in a case where the trustee has resigned or is removed that the statute gives the court power to appoint a new trustee" (the latter reference being to 1 R. S. 730, § 71). *Brater* v. *Hopper*, 77 Hun, 244 (246) ; also *Wildey* v. *Robinson*, 85 Hun, 362 (364). This view that 1 R. S. 730, § 68, and L. 1882, chap. 185, merely vest the trust in the court, to be executed by a person to be appointed for that purpose, as an agent of the court, and not as a "trustee," appears to conflict with the result in *Matter of Waring*, 99 N. Y. 114, already referred to. There the court below (see 21 Weekly Dig., 120, and statement of facts, 99 N. Y. p. 115) had appointed a "trustee" in the place of a deceased trustee. On ap-

peal, the Court of Appeals recite (p. 117) the application "for the appointment of a trustee in his" (the deceased trustee's) "place to execute said trust." "The application is made under § 81 of article 2, title 2, chap. 1, part 2, of the Revised Statutes" (misprint for *Id.*, § 68), "which vests in the Supreme Court any unexecuted express trust in real estate upon the death of the surviving trustee, and authorizes the appointment by it of some person to complete its execution. Similar provisions as to personal property are contained in chap. 185, Laws of 1882. . . . The facts referred to were, however, sufficient to authorize the court to determine that an apparent legal trust was created in the property described by the conveyances and agreements referred to, and that some of its objects remained unperformed at the time of the death of William E. Waring. These facts *authorized the appointment of a trustee* by the court below. . . . The order of the Special and General Terms should be modified by striking out so much thereof as attempts to adjudicate upon the *extent* and *validity* of the *trust*, if such provisions there are, and as thus modified should be *affirmed*" (thus in terms affirming the appointment by the court below of a trustee). The same construction was given to these statutes in 1871 in *Wells* v. *Wallace*, 2 Redf. 58 (62); and in 1884 by Surrogate Coffin in *Matter of Valentine*, 3 Dem. 563. So also in *Hawley* v. *Ross*, 7 Pai. Ch. 103. There a sole trustee had died, and the chancellor, after construing 1 R. S. 730, § 68, says: "The trust which W. James held by virtue of this bond at the time of his death devolved on this court and not upon his executors. The bond should therefore be delivered to the register or to the general guardian of the infants for their use, so that he may get a *new trustee* appointed to receive the first payment," etc. In *Royce* v. *Adams*, 123 N. Y. 402, testator devised and bequeathed all his property to his executors upon certain trusts. Before the estate had been settled all the executors and trustees resigned. The plaintiffs were appointed as successors to the trustees both by the Supreme Court and by the Surrogate's Court. The question at issue was whether these successors had authority to execute a power of sale contained in the will. This was a case where, as stated hereafter, successors to the resigned trustees might be appointed by the Supreme Court (under 1 R. S. 730, § 71) and by the Surrogate's

Court (under Code C. P., § 2818). The question now under discussion as to the power of the Supreme Court to appoint a trustee to succeed a deceased trustee was not directly presented, but the Court of Appeals say: "It is familiar law that upon the death of an original trustee the trust devolves upon the Supreme Court, and it has jurisdiction to *appoint new trustees* to execute the trust." Compare *Clark* v. *Crego*, 51 N. Y. 646; aff'g 47 Barb. 599. In *Delaney* v. *McCormack*, 88 N. Y. 174, the will gave a power to the executors to sell land and distribute the proceeds. They all died. An action was brought for construction of the will and *appointment of a trustee.* The court below determined that it had jurisdiction to appoint a new trustee, and made an appointment, and decreed that plaintiff was entitled to the proceeds after payment of liens. The judgment was affirmed by the General Term (25 Hun, 574), the court saying: "The executors who had the power were dead. The execution of the power devolved upon a court of equity. It is never permitted that a valid trust shall fail of execution for the want of a trustee." On appeal, the Court of Appeals unanimously affirmed the judgment, saying (p. 182) that as the power was general, and in trust, and imperative, "a further provision, reaching the emergency of the death of the grantees, becomes applicable. It is enacted (§ 102) [of Powers] that the provisions of §§ 66–71 of article 2, relating to express trusts, shall apply to powers in trust, and *section sixty-eight* of that article confers upon the court, upon the death of the surviving trustee, his powers and duties," etc. This opinion does not in so many words approve the act of the court below, in appointing a *trustee*, but it does affirm the judgment which did so, adding, "We discover, therefore, no error in the disposition on the case." In *Farrar* v. *McCue*, 89 N. Y. 139, one trustee died, and then the two others resigned. The court says: "Death and resignation took away the trustees. The court properly appointed successors." Here, it is true, the power to appoint successors to those who resigned may have been a sufficient basis for the action of the court. In *Cooke* v. *Platt*, 98 N. Y. 35, there was a power of sale, in trust, in the executors. They were removed by the court, and a "receiver" was appointed to sell. The court says: "The power of sale was a power in trust, which, though discretionary, could, on the *death*

or removal of the executors, be executed under the discretion of the court, by a *trustee* appointed for that purpose'' (citing 1 R. S. 730, § 71, relating to removal, and 1 R. S. 734, § 102, making 1 R. S. 730, §§ 66–71 applicable to powers), and they held that the "receiver," as appointed in this instance, could not sell. In *Greenland* v. *Waddell*, 116 N. Y. 234, the capacities of trustee and executor were distinct. V. R. Boerum was sole surviving executor and trustee. Boerum resigned as trustee and Mrs. Bush was appointed by the Supreme Court as trustee in his place. She executed a deed under which plaintiff claimed title. On the facts of the case it was found that Mrs. Bush had individually acquired the complete title to the land, and could, therefore, elect to take and convey the land in spite of the power to sell remaining in Boerum as executor. The question of the appointment of a successor to a deceased trustee was not, therefore, presented. In *Emerson* v. *Bleakley*, 2 Abb. Ct. App. Dec. 22 (27), the court refers incidentally to 1 R. S. 730, § 68, as "the provisions of the statute giving the title *to a trustee to be* appointed by the court." In *Matter of Van Schoonhoven*, 5 Pai. Ch. 559 (560), Chancellor Walworth says: "The sixty-eighth section of the article relating to uses and trusts (1 R. S. 730) only authorizes the *appointment of a new trustee* where the only surviving trustee happens to die," etc. See also *Matter of Tousey*, 2 App. Div. 569.

§ 126. **Death of one, leaving survivor.**—The Real Property Law (§ 91) gives power to the Supreme Court to appoint a successor upon the death of a sole or last surviving trustee. Also L. 1882, chap. 185. This provision does not cover a case where one of several dies. (Compare *post*, § 636 *et seq.*) The terms of § 2818 of the Code, relating in general to surrogates' courts, are broader, providing that where one of two or more *testamentary trustees* dies, a successor shall not be appointed except where such appointment is necessary in order to comply with the express terms of the will, or unless the same court (surrogate's) or the *Supreme Court* shall be of the opinion that the appointment of a successor would be for the benefit of the *cestui que trust.* And in any case where, of two or more trustees, the sole surviving, or sole acting trustee is also a beneficiary, the court may ap-

point an associate. For the survivor cannot, as to his own beneficial interest, continue to act, and there is, in fact, as to such interest, a complete vacancy. *Rogers* v. *Rogers*, 111 N. Y. 228 (238). But the Court may, if it sees fit, itself exercise the necessary discretion called for in reference to the management of the trust, and may direct the mere formal acts decided upon to be done by the sole trustee. *Id.* On the general subject of this section, see also § 597 *post.*

§ 127. Upon resignation or removal.—When a trustee resigns or is removed, the power of the Supreme Court to appoint a successor is governed by Real Prop. L., § 92 :

"The Supreme Court has power, subject to the regulations established for the purpose in the general rules of practice :

"1. On his application by petition or action, to accept the resignation of a trustee, and to discharge him from the trust on such terms as are just.

"2. In an action brought, or on a petition presented, by any person interested in the trust, to remove a trustee who has violated or threatens to violate his trust, or who is insolvent, or whose insolvency is apprehended, or who for any other cause shall be deemed to be an unsuitable person to execute the trust.

"3. In case of the resignation or removal of a trustee, to appoint a new trustee in his place, and in the meantime, if there is no acting trustee, to cause the trust to be executed by a receiver or other officer under its direction. This section shall not apply to a trust arising or resulting by implication of law, nor where other provision is specially made by law, for the resignation or removal of a trustee or the appointment of a new trustee."

This section applies only to express trusts (*Id.*) and to powers in trust. Real Prop. L., § 162. *Leggett* v. *Hunter*, 19 N. Y. 445 (459) ; *Royce* v. *Adams*, 123 N. Y. 402 ; *In Matter of Van Wyck*, 1 Barb. Ch. 565. As to the general power of the Supreme Court under this section, see also *Quackenboss* v. *Southwick*, 41 N. Y. 117. A trustee's petition to the court to be "relieved" from the trust, and permission by order of court, and discharge, constitute a resignation, under this section, authorizing an appointment of a successor, and in such case the court acts under its statutory authority, and not in pursuance of its

general equity jurisdiction. *Lahey* v. *Kortwright*, 132 N. Y. 450 (458). The order appointing a successor to a trustee who has resigned need not define in terms his powers in order to give him all the powers possessed by his predecessor. It is sufficient if the purpose appears from the record to substitute him as trustee under the will, and to have him thereupon derive his powers from that instrument. *Lahey* v. *Kortwright*, 132 N. Y. 450 (458).

§ 128. **Resignation or removal of one of several.**—In case of the removal or resignation of any trustee, even though others remain, the Supreme Court has power, under Real Prop. L., § 92, *supra*, to appoint a successor ; and see also the reference to the Supreme Court in the statute quoted below, § 129.

(*b*) *Appointment by Surrogate's Court.*

§ 129. **Statutes.**—Section 2818 of the Code of Civil Procedure provides as follows :

" When a sole testamentary trustee dies or becomes a lunatic, or is, by a decree of the Surrogate's Court, removed or allowed to resign, and the trust has not been fully executed, the same court may appoint his successor, unless such an appointment would contravene the express terms of the will. Where one of two or more testamentary trustees dies or becomes a lunatic, or is by decree of the Surrogate's Court removed or allowed to resign, a successor shall not be appointed except where such appointment is necessary in order to comply with the express terms of the will, or unless the same court or the Supreme Court shall be of the opinion that the appointment of a successor would be for the benefit of the *cestui que trust.* Unless and until a successor is appointed the remaining trustee or trustees may proceed and execute the trust as fully as if such trustee or trustees had not died, become a lunatic, been removed or resigned. Where a decree removing a trustee or discharging him upon his resignation does not designate his successor, or the person designated therein does not qualify, the successor must be appointed and must qualify in the manner prescribed by law for the appointment and qualification of an administrator with the will annexed."

Prior to 1884, § 2818 was confined to the case of the death,

resignation, or removal of a *sole* testamentary trustee; but it was held that the language of the whole section showed that it was the intention to provide for a case where all the testamentary trustees died or resigned, and that there was no purpose to confine it to the case of a sole testamentary trustee." *Royce* v. *Adams*, 123 N. Y. 402 (404). And the mere fact that a person named in a will is *called* a trustee does not bring him within the jurisdiction of the Surrogate's Court unless he is in fact a testamentary trustee under some technical express trust. *Matter of Hawley*, 104 N. Y. 250 (261). It is to be noticed that under this statute the power to appoint a new trustee is given to the Surrogate's Court only in case of the death, lunacy, resignation, or removal of a testamentary trustee. The cases of vacancy caused by renunciation, failure of the will to name a trustee, or death before the will goes into effect of a person named as trustee, are not covered. And the "Surrogate's Court is a creation of the statute, of inferior and limited jurisdiction. Those claiming under the decree of a surrogate must show affirmatively his authority to make it, and the facts which gave him jurisdiction." *Matter of Hawley*, 104 N. Y. 250 (262). The Surrogate's Courts, as such, are mentioned and continued in the present Constitution of New York, but they and the surrogates only "have the jurisdiction and powers which the surrogates and existing Surrogate's Courts now possess until otherwise provided by the Legislature." (Article VI., § 15.) The power of the Surrogate's Court to appoint a successor to a deceased testamentary trustee originated with the Code of Civil Procedure, § 2818, in 1880, prior to which time the power resided exclusively in the Court of Chancery, and later in the Supreme Court. The act of 1882, chap. 185, however, provided for the devolution of the trust upon the *Supreme Court*, in all cases of personal property trusts. In 1884, however, § 2818 was re-enacted, with some changes, thus establishing the concurrent jurisdiction of the Surrogate's Court, in cases of testamentary trusts. See the discussion in *Matter of Valentine*, 3 Dem. 563. Concerning the *method of appointing* successor by the Surrogate's Court, notice to parties, bond, etc., see *Tompkins* v. *Moseman*, 5 Redf. 402; *Matter of Valentine*, 3 Dem. 563; *Matter of Whitehead*, 3 Dem. 227.

§ 130. **Testamentary trustee—Definition.**—"The expression 'testamentary trustee' includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is *separable* from his functions as executor or administrator." Code C. P., § 2514, subd. 6. This section defines the term as used in chap. 18 of the Code, relating to Surrogate's Courts. (Code C. P., § 2514, first sentence.) This chapter covers § 2818, relating to appointment of a successor by a Surrogate's Court. If the offices of the executor or administrator and trustee are not separable, the trustee is not a "testamentary trustee" under § 2818. *Matter of Clark*, 5 Redf. 466. But in *Matter of Hecht*, 71 Hun, 62, this distinction appears to be overlooked; for the executor-trustee having died, and an administrator with the will annexed having been appointed to succeed him, it was held that the "trust was annexed to the office of executor," but that nevertheless a new trustee should be appointed by the surrogate to carry out the trust. But § 2815 of the Code requiring security from testamentary trustees in certain special cases there specified does not cover those appointed as successors. *Matter of Whitehead*, 3 Dem. 227 (231, 232). An interesting point relating to the scope of the term testamentary trustee, in the statute authorizing the appointment of a successor by the surrogate, is treated in *Matter of Morian*, 1 Con. 503, where testator had insured his life in favor of A, and on the same day executed his will, appointing A executor, and directing him to distribute the proceeds of the policy to persons named, and still on the same day A agreed to hold said fund in trust and dispose of it as prescribed in the will. Thereafter testator died, and A qualified as executor. It was held that he thereby became a *testamentary trustee*, and that on his death the surrogate had power to appoint a successor. The term testamentary trustee may be restricted in its application to the very persons named in the will, excluding successors. *Matter of Whitehead*, 3 Dem. 227 (231, 232).

If a general annuity is given, charged on land devised, and the devisees and annuitant sell the land, and the devisees turn over to

the executor a fund sufficient to raise the annuity, the executor does not become a *testamentary trustee* as to this fund, and is not accountable as such. He is the mere agent of the devisees. (He would, as to the annuitant, appear to be a *trustee*, though not under the will. This is not involved in the case cited.) *Matter of Collins*, 144 N. Y. 522.

(c) *Appointment by Third Party.*

§ 131.—A creator of a trust may delegate to a trustee named by him (or to other persons) the power to appoint a co-trustee or to fill vacancies. Compare *Hartnett* v. *Wandell*, 60 N. Y. 346; *Rogers* v. *Rogers*, 4 Redf. 521. But authority to surviving trustees to appoint a successor to a deceased associate does not invalidate a deed executed by the survivors without choosing such successor. *Belmont* v. *O'Brien*, 12 N. Y. 394 (405). A person having a fiduciary power of appointing a trustee cannot appoint himself to the position. *In re Newen*, (1894) 2 Ch. 297 (309).

(3) *The Trustee's Title.*

(a) *Legal and Equitable Title.*

§ 132. **The revisers' purpose.**—In their report to the Legislature, the revisers of 1830 called attention to the evils which arose from separating the legal and equitable title in the case of uses and later of trusts, and placing the legal title in the trustee and the equitable title in the beneficiary. (See *ante*, §§ 4, 5.) And they proposed to remedy this defect in the law and effect a vesting of the whole title in some one, in every case, by providing (1) that if a trust was passive, the entire title, legal and equitable, should vest in the beneficiary, free of the trust; (2) that if it was active, but not for any purpose requiring title in the trustee, the title should vest in those otherwise entitled, subject to the execution of the trust as a power; and (3) that if it was active, and fell within any of the classes requiring and authorizing title in the trustee, he should have it all, legal and equitable, subject only to the right of the beneficiary to compel him, in equity, to carry out the trust. See also *post*, Chap. XI.

§ 133. **The revised statutes.**—Accordingly, it was provided, by the Revised Statutes, in reference to the active express trusts

thereby authorized, that "every express trust, valid as such, in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust. The persons for whose benefit the trust is created shall take no estate or interest in the lands, but may enforce the performance of the trust in equity." 1 R. S. 729, § 60.

§ 134. **The real property law.**—In 1896, however, the Legislature repealed the provision just quoted, and enacted the following substitute: "Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the *legal* estate, subject only to the execution of the trust, and the beneficiary shall not take any *legal* estate or interest in the property, but may enforce the performance of the trust." Real Prop. L., § 80. Whether the revisers of 1896 intended to revert to the theory of a separated title, it might be difficult to say. Such an intention would constitute the only justification for the change in phraseology. It may perhaps be supposed that they relied on another provision of the statute to counteract any such view. For § 71 of the Real Property Law provides that "every estate or interest in real property is deemed a legal right, cognizable as such in the courts, except as otherwise prescribed in this chapter." If this was their view, the result is that while the revision of 1830 got rid of separate titles by vesting them both in the trustee, the revision of 1896 attempts to get rid of them by killing out the equitable title entirely. Considering the extremely difficult nature of the questions involved, the complications that have heretofore arisen from legislative attempts to deal with them, and the fact that the meaning of the repealed section had, in the course of sixty years, become settled, the change is unfortunate. Whether any change of substance has, or has not, been thus introduced, is at present necessarily somewhat uncertain. The law as it stood prior to October 1st, 1896, will now be considered.

§ 135. **Title in trustee essential.**—Unless the legal title is vested in the trustee there can be no express trust. *Hopkins* v. *Kent*, 145 N. Y. 363.

§ 136. **"Whole estate in law and in equity."**—(Under the present statute, the trustee has "the legal estate.") The term "whole estate" does not mean that the trustee must necessarily hold the land *in fee*. It refers to the classification of estates as legal or equitable, and gives both to the trustee; it does not refer to the classification of estates as estates for life, estates in fee, etc. The meaning of it is that while a trustee may hold an estate in trust either for a term measured by a life, or two lives, or may in certain cases hold a fee in order to enable him to fulfil the purposes of a trust requiring a fee in him, *Bennett* v. *Garlock*, 79 N. Y. 302 (317) (as, for example, a trust to sell to pay debts), yet in either case, while the trust lasts and he continues to hold, he has, at any given time, the "whole estate in law and in equity." *Knowlton* v. *Atkins*, 134 N. Y. 313 (317); *Matter of Tienken*, 131 N. Y. 391 (401); *Losey* v. *Stanley*, 147 N. Y. 560 (568); *Moore* v. *Appleby*, 36 Hun, 368; affi'd 108 N. Y. 237; *Embury* v. *Sheldon*, 68 N. Y. 227 (234); *Townshend* v. *Frommer*, 125 N. Y. 446 (455, 468); *Bennett* v. *Garlock*, 79 N. Y. 302 (317 *et seq.*); *Nichol* v. *Walworth*, 4 Den. 385; *Stevenson* v. *Lesley*, 70 N. Y. 512 (516, 517); *Chism* v. *Keith*, 1 Hun, 589; *Manice* v. *Manice*, 43 N. Y. 303 (363, 364); *Magill* v. *McMillan*, 23 Hun, 193; *Matteson* v. *Armstrong*, 11 Hun, 245 (249).

In cases where the purposes of the trust require a fee in the trustee, as in the example just mentioned, he then, of course, holds the "whole estate" in the same sense in which any owner in fee holds the whole estate, *Bennett* v. *Garlock*, 79 N. Y. 302 (320), but subject to the performance of the trust. In cases where he holds not a fee but an estate for the life of one or of two persons, he then has the "whole estate" in the same sense in which any tenant for life (whether for his own life or *pur autre vie*) holds the whole estate, but still subject to the performance of the trust. The term of a trust estate for a life or two lives may be further modified in character in that it may be limited to cease upon the earlier lapse of a specified period, as, for example, "during the lives of B and C, but not beyond the term of ten years;" or "until the expiration of ten years, or the earlier decease of B and C." In this case, also, the trustee, while the trust continues, has the "whole estate" in the same

sense as a person to whom such an estate is given beneficially and not in trust, would hold the whole estate. In all these cases the trustee holds the whole of the estate which has been given him, and holds it all both as a legal estate and as an equitable estate. But what the estate is, which has been given him—that is, whether for life, or in fee, etc., is another question, to be determined according to the terms of the grant or devise. These matters are briefly stated here for their bearing on the meaning of the term "whole estate." The different kinds of estates that may be given in trust, whether for life, or in fee, etc., will be considered more fully hereafter in the chapter on the Trust Term.

§ 137. **Trustee's estate is subject to the trust.**—It is to be noticed here, that although the trustee has the "whole estate in law and in equity," in the sense already discussed, he holds it "subject to the execution of the trust," and that while the beneficiary has no "estate" whatever, he has the right to "enforce the performance of the trust in equity." *Bennett* v. *Garlock*, 79 N. Y. 302 (320); *Anderson* v. *Mather*, 44 N. Y. 249. This right will be considered more fully hereafter, partly in this chapter, in its aspect of a qualification of the power and rights of the trustee, and partly in the chapter on "The Beneficiary."

Transfers of property in trust are subject to the application of the Taxable Transfer Act. *Matter of Hoffman*, 143 N. Y. 327. See *post*, § 382.

§ 138. **Trust invalid on its face.**—If a trust is void on its face, no title vests in the trustee. *Heermans* v. *Burt*, 78 N. Y. 259 (264); see s. c. 64 N. Y. 332; see § 523, *et seq.*

§ 139. **Trust—Remainder after.**—"The preceding section [that is, Real Prop. L., § 71, quoted above, § 134] shall not prevent any person, creating a trust, from declaring to whom the real property, to which the trust relates, shall belong, in the event of the failure or termination of the trust, or from granting or devising the property, subject to the execution of the trust. Such a grantee or devisee shall have the legal estate in the property, as against all persons, except the trustees and those lawfully claiming under him." Real Prop. L., § 72. *Van Camp* v.

Fowler, 59 Hun, 311 ; affi'd 133 N. Y. 600 ; *Losey* v. *Stanley*, 147 N. Y. 560 ; *Matter of Young*, 145 N. Y. 535 ; *Embury* v. *Sheldon*, 68 N. Y. 227 ; *Matter of Crossman*, 113 N. Y. 503 (509) ; *Manice* v. *Manice*, 43 N. Y. 303 (307, 308) ; *Levy* v. *Levy*, 79 Hun, 290 ; *Tucker* v. *Ball*, 1 Barb. R. 94 ; *Gersen* v. *Rinteln*, 2 Dem. 243 ; note, 18 Abb. N. C. 297 ; *Coit* v. *Rolston*, 44 Hun, 548 ; *DaCosta* v. *Bass*, 48 Hun, 31. The former provision concluded with the word *them*, which is now changed to *him*.

§ 140. **Absolute, defeasible or contingent remainder.**— The remainder thus permitted may be either absolute or defeasible (*Matter of Seaman*, 147 N. Y. 69), vested or contingent ; thus a trust during the life of A, remainder to B in fee ; or, a trust during the life of A, and if at A's death B be then living, then to B in fee. Or, the creator of the trust may vary the form, and grant or devise an estate beneficially to B, *subject* to a trust for A ; thus, " I devise my land to X in trust to receive the rents and profits and apply them to the use of A, for his life, and subject to said trust, I devise said lands to B in fee." This latter form is from one point of view preferable. For if a *remainder* be granted or devised, limited on a prior estate (whether in trust or not) it is often difficult to determine, as a matter of construction, whether it was intended as a vested or a contingent remainder. If, however, a vested estate be in fact intended, then an outright grant or devise merely subject to the trust, often furnishes a more simple form of expressing that intention with clearness. (Even though, in this form, an intention to have the property vest at once is clear, yet, as it does not effect a present vesting in possession, it may of course still be open to dispute, whether it is vested absolutely, or vested subject to being divested on the happening or non-happening of some subsequent event.) As to these two forms, see *Goebel* v. *Wolf*, 113 N. Y. 405 (413, 415). A remainder after a trust estate may be sold, devised, mortgaged, and in all respects dealt with, like any other remainder. *Gwyer* v. *Gwyer*, 5 App. Div. 161 ; *Douglas* v. *Cruger*, 80 N. Y. 15 (18).

Where a contingent remainderman of an estate on which there is a mortgage, is compelled in order to protect his contingent es-

tate against loss through foreclosure, to advance the money to pay off the mortgage, and it subsequently turns out, by the failure of the contingency, that he had no estate in the property, he is entitled to be subrogated to the rights of the mortgagee, for reimbursement from the land, as against those who benefited by his payment.

This is so though the precedent estate is held in trust, and the time has not yet arrived when, by the terms of the trust, there is an absolute direction to sell. The land held in trust may be sold under decree of foreclosure to satisfy the claim of the remainderman. *Pease* v. *Egan*, 131 N. Y. 262.

As to the bearing of the taxable transfer act on the right of succession to a contingent or defeasible remainder limited on an express trust, see *Matter of Curtis*, 142 N. Y. 219; note, 24 Abb. N. C. 365; *Matter of Davis*, 149 N. Y. 539; *Matter of Seaman*, 147 N. Y. 69; *Matter of Hoffman*, 143 N. Y. 327.

§ 141. **Remainder in beneficiary.**—The beneficiary of an express trust may also be the grantee or devisee of a remainder limited on the estate of the trustee, as, for example, in the case of a devise to A, to receive and apply the rents and profits to the use of B, during the latter's minority, remainder to B in fee. *Martin* v. *Pine*, 79 Hun, 426. So if the instrument creating the trust grant or devise the remainder to another, the beneficiary may buy it in, and so become the remainderman. So, no doubt, the creator of the trust may grant or devise a remainder to the beneficiary, limited on a trust which is to continue throughout the latter's life, so that on his death the estate, being thus relieved of the trust, would sink into and become part of A's estate and pass to his heirs or devisees. See *Howland* v. *Clendenin*, 134 N. Y. 305 (310).[1] In all these cases, his estate in remainder, whether vested or contingent, absolute or defeasible, is unaffected in any manner by the fact that he is also the beneficiary of the precedent trust estate. It is alienable, devisable and descendible, according to its nature, like an estate in possession. Real Prop. L., §§ 49 and 81. And on the other hand, the fact that

[1] As to *Howland* v. *Clendenin*, *supra*, compare *Arcularius* v. *Geisenhainer*, 3 Bradf. 64, and other cases bearing on the subject in § 359, *post*.

the beneficiary is also the remainderman does not in any manner affect the validity of the trust. He is interested in both estates, but he is vested with the title to only one of them, and there is no merger. *Raymond* v. *Rochester Trust etc. Co.*, 75 Hun, 239 ; *Greer* v. *Chester*, 62 Hun, 329 ; aff'd 131 N. Y. 629 ; *Asche* v. *Asche*, 113 N. Y. 232 ; *Matter of Lewis*, 3 Misc. 164. Under L. 1893, ch. 452, and the present § 83 of the Real Property Law, a beneficiary under a trust to receive and apply rents and profits, who is also entitled to the remainder, may release his interest under the trust and effect a merger of the trust estate in the remainder. See further as to remainders, *post*, § 359.

§ 142. **Remainder in trustee.**—A creator of a trust may also grant or devise a remainder to the trustee, limited on the trust. *Rathbone* v. *Hooney*, 58 N. Y. 463. Or, he could grant or devise the land to the trustee, subject to the execution of the trust. In either case, the trustee would take title in two capacities, holding the trust estate as trustee, and the other estate as an individual. And while he could not, as stated later, mortgage the trust estate (except under certain circumstances), yet a mortgage given by him would bind his remainder. *Rathbone* v. *Hooney*, 58 N. Y. 463. So a conveyance by a trustee, though void as regards the trust estate, may be valid as affects his personal interests, if any. *Champlin* v. *Haight*, 7 Hill. 245 (248).

§ 143. **Trust—Reversion.**—" Where an express trust is created, every legal estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to, the person creating the trust or his heirs." Real Prop. L., § 82. This provision as to a reverter to the creator of the trust *or* his heirs, appears to relate, in its two alternatives, to the two methods of creating trusts by deed (or declaration) or by will. If by deed, the estate not transferred remains in the creator of the trust ; if by will, it reverts to his heirs. It appears to be clear that the " heirs" in whom the reversion would thus vest are the persons who are such at the death of the testator, and not those who would be such if he had died later at the time when the reversion becomes an estate in possession. *O'Brien* v. *Mooney*, 5 Duer, 51 (54). See *Stevens* v. *Miller*, 2 Dem. 597 ; *Hor-*

ton v. *Cantwell*, 108 N. Y. 255 (268). In addition to a "reversion" proper, this section also covers the case of a "possibility of reverter." That is, even where a fee is granted, as, in trust to sell and pay debts, yet there is a possibility that after the debts are all paid some of the property will remain, in which case it belongs to the creator of the trust. *Colie* v. *Jamison*, 4 Hun, 284 (286).

§ 144. **"Whole estate"—Qualification.**—When the statute provides that the trustee shall have the legal estate, it expressly confines the provision to express trusts. That is, the beneficiary shall not have an equitable title but merely an equitable interest. *Bennett* v. *Garlock*, 79 N. Y. 302 (320). It does not mean that one who owns land, but has only an equitable title, the legal title being in another under an implied or resulting trust, cannot convey his equitable title to a trustee, giving the latter the same right the grantor or devisor had to get in the legal title. In such a case the grantee or devisee in trust would receive only the equitable title. Thus, compare the case of a trust of personalty, where a bond and mortgage were executed to A who really held them in trust for B. B legally transferred his interest in them to C in trust. Here on A's death, while her administratrix with the will annexed had a legal right to receive payment, and discharge the debt, in equity the proceeds belonged to C, the trustee. *Matter of Hobson*, 61 Hun, 504, aff'd 131 N. Y. 575. See *Tierney* v. *Wood*, Ames' "Cases on Trusts," p. 182.

§ 145. **To trustee and his heirs.**—A grant or devise to a "trustee, his heirs, executors, administrators and assigns," refers to the quality of the estate, and does not convey anything to the heirs, or render the trust estate descendible. *Flagler* v. *Schoeffel*, 40 Hun, 178. But it may *prima facie* give the trustee the fee in trust, *Bennett* v. *Garlock*, 79 N. Y. 302 (317). Compare *Pfeiffer* v. *Rheinfrank*, 2 App. Div. 574.

§ 146. **Title—Gift of rents, when essential.**—"A *devise* of real property to an executor or other trustee, for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him; but

the trust shall be valid as a power, and the real property shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power." Real Property L., § 77. *Chamberlain* v. *Taylor*, 105 N. Y. 185 (191); *Steinhardt* v. *Cunningham*, 130 N. Y. 292; *Buckley* v. *Buckley*, 11 Barb. R. 43 (78); *Bouton* v. *Thomas*, 46 Hun, 6; *Germond* v. *Jones*, 2 Hill. 569 (573). As to personal property, see *Hagerty* v. *Hagerty*, 9 Hun, 175.

This statute relates to the *first* and *second* of the four classes of permitted express trusts in land, but it omits reference to a trust to *lease*, included in the *second* class. By its terms, it refers only to *devises*, and not to *grants*, in trust.

The general purpose of this distinction between deeds and wills seems to have arisen from the necessities of the case where a debtor proposes to make an assignment for the benefit of creditors. For unless he could transfer the title to the assignee, there would, at least in general, be no protection against attachments and levies. A power to sell would seldom, if ever, serve the purpose. But where he proposed to make a disposition by will, for the same purpose, no such necessity for transferring title to a trustee would exist. After his death his property must be marshalled, and all debts must be paid in due order. Therefore a power would serve every purpose. It was accordingly provided, by the statute, that while he might create an express trust by deed, vesting title in the trustee, for the purpose of sale, to pay any existing debts, or of sale, mortgage or lease to pay those that were a charge on the land, yet a devise for sale or mortgage should not vest title, unless such an intent was made complete by empowering the trustee to receive the rents and profits. *Heermans* v. *Robertson*, 64 N. Y. 332 (342). Though such was the general purpose, the statute, by its terms, applies to all testamentary trusts to sell or mortgage, whether intended for the payment of debts only or of annuities or other legacies. The *third* and *fourth* classes are, by the terms of the statute, "to receive the rents and profits of lands, and apply them," etc.; and "to receive the rents and profits of lands, and to accumulate the same," etc. Thus, authority to receive rents and profits is essential in trusts to *sell* or *mortgage*, when they are created by will; no such requirement as to trusts to *lease* is found in terms

in the statute; and trusts to *apply*, and trusts to *accumulate*, must be such as to give to the trustee, either in terms or by necessary implication, authority to *receive* the rents and profits, and this, whether the trust be created by deed or will. See *Hawley* v. *James*, 16 Wend. 60 (114); Real Prop. L., §§ 76, 77; *Purdy* v. *Wright*, 44 Hun, 239; *Weeks* v. *Cornwell*, 104 N. Y. 325 (339); *Hotchkiss* v. *Elting*, 36 Barb. 38; *Graham* v. *Livingston*, 7 Hun, 11 (13). The words "rents and profits" need not be used, nor specific authority to receive the same conferred in terms. The intention to empower the trustee to receive them may be inferred, as, by a devise to the trustee with direction to "apply the rents and profits to the use of," etc. Here the devise, and the direction, necessarily involve the right to receive. *Knox* v. *Jones*, 47 N. Y. 389 (398). (But compare *Hawley* v. *James*, 16 Wend. 60 (114–115), with *Id.* (151–155).) *Woodward* v. *James*, 115 N. Y. 346; *Morse* v. *Morse*, 85 N. Y. 53 (59); *Donovan* v. *Van De Mark*, 78 N. Y. 244; *Dillaye* v. *Greenough*, 45 N. Y. 438 (444); *Tobias* v. *Ketchum*, 32 N. Y. 319 (328); *Ward* v. *Ward*, 105 N. Y. 68 (74); *DeKay* v. *Irving*, 5 Den. 646 (651); *Vail* v. *Vail*, 4 Pai. 317 (328); *Betts* v. *Betts*, 4 Abb. N. C. 317 (385); but see *Manice* v. *Manice*, 43 N. Y. 303 (363). But the authority, express or implied, to receive the rents and profits must be actual, and not merely incidental and illusory. *Heermans* v. *Burt*, 78 N. Y. 259 (267). Authority to rent, lease, repair, and insure, pay taxes and assessments, and pay over one third of the net income to a beneficiary creates an express trust and gives title to the trustee. *Tobias* v. *Ketchum*, 32 N. Y. 319. But authority to sell and *invest* may not imply power to receive income, and so does not involve a trust. *Vernon* v. *Vernon*, 53 N. Y. 351 (357, 358). A direction that the property shall "remain under the control of my executor during the minority of "A," an infant, does not create a valid trust. There is no authority to receive rents and profits, no direction as to disposition of rents and profits, and no specification of the manner of carrying on any trusts or any purpose. *Aldrich* v. *Funk*, 48 Hun, 367 (375). And although the authority to receive rents and profits is necessary to create an express trust, and the fact that such authority is given indicates that a trust was intended, *Brewster* v. *Striker*, 2 N. Y. 19, yet this indication is not con-

clusive. The purpose for which they are given (and the term), must also be within the statute. *Holly* v. *Hirsch*, 135 N. Y. 590. Thus a power to receive rents, amalgamate them with the corpus, and divide the gross bulk as principal, is not an express trust. *Cooke* v. *Platt*, 98 N. Y. 35 (39). A devise in trust, to receive rents and profits, where there is no direction to apply them to the use of beneficiaries or accumulate them, is not valid as an express trust. *Holly* v. *Hirsch*, 135 N. Y. 590 (594); *Dillaye* v. *Greenough*, 45 N. Y. 438 (444). A trust to receive rents, and to pay over annual sums to beneficiaries, is not valid as a trust unless the payments are to be made from rents or income. To receive the rents, and pay out from corpus will not answer. *Henderson* v. *Henderson*, 113 N. Y. 1 (10, 12). And the implication of a trust, from authority to receive income, does not have the same force where the property is personal, as where it is real. *Onondaga Trust & Deposit Co.* v. *Price*, 87 N. Y. 542 (547). So a mere power of sale, with authority to receive the rents and profits prior to actual sale, is not in itself enough to constitute an express trust. For here the essential element of vesting *title* in the trustee is lacking. *Matteson* v. *Armstrong*, 11 Hun, 245.

§ 147. **Future trust—Title.**—Where a trust is created to go into operation *in futuro* the trustee, of course, acquires no estate in possession, until the future period designated. *Hawley* v. *James*, 16 Wend. 60 (115 *et seq.* 151); see *Van Cott* v. *Prentice*, 104 N. Y. 45 (55); and Real Prop. L., §§ 27, 28; *Gilman* v. *McArdle*, 99 N. Y. 451 (459). So, a trust instrument delivered *inter vivos* may merely direct, as to the period after the grantor's death, that the property be held as directed in a sealed paper also delivered, but only to be opened at the grantor's death. *Van Cott* v. *Prentice*, 104 N. Y. 45 (55). Such a trust differs from a trust created by will, in that the latter does not go into effect, and no title passes to the trustee, until the testator's death, and in the meantime the will is revocable; while in the case supposed, the deed goes into effect, and becomes binding, upon delivery of the deed, and the title (to the future estate), vests in interest at once in the trustee, though it does not vest in possession until the grantor's death; and in the meantime it is

irrevocable (unless a power of revocation is reserved, see *post*, § 685, *et seq.*). *Gilman* v. *McArdle*, 99 N. Y. 451 (459).

§ 148. **Trust deed—Does not relate back.**—Where a trust instrument is void, a second one executed subsequently, and intended to cure its defects does not relate back to the original date and cut out a lien on the creator's property which has attached intermediate the creation of the two trusts. And where a trust instrument is void on its face, it cannot, in an action brought for that purpose, be reformed so as to affect the lien as above. See *Sutherland* v. *Bradner*, 116 N. Y. 410.

§ 149. **When trustee jointly interested.**—As to rents and income, a trustee may be jointly interested with the beneficiary, having part of the use and income for himself and also holding in trust for the support and education of another, etc. *Macomber* v. *Bank of Batavia*, 12 Hun, 294. The trust ranges over the entire estate ; but subject to the trust for the other person, his own personal interest is absolute. *Woodward* v. *James*, 115 N. Y. 346.

§ 150. **Trust in future proceeds.**—A created a trust in all of certain property, for the life of B. On B's death the trustee was to sell the land, pay legacies, and divide the surplus into four shares, two of which he was to hold in trust for C's life. It was held, that between B's death and the time of actual sale there was *no* trust. See *Matteson* v. *Armstrong*, 11 Hun, 245.

§ 151. **Trust partly illegal.**—Even though the trust instrument may attempt to create an illegal as well as a legal trust, yet, if the latter is separable from the former, it is sufficient to sustain the grant or devise to the trustee of an estate commensurate with the legal trust, without reference to the one illegally attempted. This was the principle laid down and applied by the Court of Chancery in *Hawley* v. *James*, 5 Pai. 320 (458, 459), and though the appellate court deemed it inapplicable in that case, it did not then disapprove the principle, and later approved and followed it. *Irving* v. *DeKay*, 9 Pai. 521 (527, 528). See also *Van Vechten* v. *Van Veghten*, 8 Pai. 104 (119–120) ; *Haxtun*

v. *Corse*, 2 Barb. Ch. 506 (519); *Kane* v. *Gott*, 24 Wend. 641 (666); *Darling* v. *Rogers*, 22 Wend. 483; *Parks* v. *Parks*, 9 Pai. 107 (118), aff'd, N. Y. Commercial Advertiser, Jan'y 3, 1843; *Dupre* v. *Thompson*, 4 Barb. 279.

§ 152. Trustee's title subject to debts and liens.—The trust estate in the hands of the testamentary trustee is of course liable to any amount required to pay testator's debts, to the same extent as if devised beneficially. *Rosenburg* v. *Rosenburg*, 40 Hun, 91; *Reed* v. *Lozier*, 48 Hun, 50; see 23 Abb. N. C. 20; *Thorp* v. *Munro*, 47 Hun, 246. And he is required, to the extent of the property devised, to satisfy mortgages thereon, without calling on testator's executors, who are ultimately liable only for a deficiency on foreclosure. Real Prop. L., § 215; *Hauselt* v. *Patterson*, 124 N. Y. 349. And the trustee's title is also subject to a lease executed before the creation of the trust, *Gilchrist* v. *Stevenson*, 9 Barb. R. 9 (16), and the trustee is entitled to sue for and collect the rent. *Ryers* v. *Farwell*, 9 Barb. R. 615 (617).

§ 153. Title in trust—Estoppel to deny.—If one holds property under a grant or devise such as might have been construed to give him beneficial ownership, but long treats the property as held in trust, under the deed or will, for another, he is, by his own acts and construction estopped from dealing with it as his own. *Easterly* v. *Barber*, 65 N. Y. 252. And his assignee or vendee with notice stands in the same position. *Reid* v. *Sprague*, 72 N. Y. 457.

§ 154. Lapse of share—Effect on title.—If a trust is created to pay rents to certain persons designated, share and share alike, and one of them dies before the trust instrument goes into effect, the lapse as to his share does not affect the title of the trustee as to the remaining shares. *Savage* v. *Burnham*, 17 N. Y. 561 (575).

§ 155. After vesting, what does not impair.—When title has once vested irrevocably in the trustee, the grantor, or the heirs of the devisor, have of course no further control over the trust estate, except as the same may have been reserved in the

trust instrument. Thus, he cannot affect the land by mortgage (if the trust deed is recorded) except as to his reversion, if any. *Briggs* v. *Davis*, 21 N. Y. 574. Nor can he, after creating in his lifetime a trust for a term which extends beyond his own life, dispose of the same property by will, except as to the remainder after the first trust. And this is so even though the will was executed before the first trust was created, but went into effect after it. *Matter of Clute*, 80 N. Y. 651. But where a deed of trust covers all the grantor's property, a subsequent will creating a trust may nevertheless have some scope. For the deed cannot, as a general proposition, cover after acquired property, while the will does, and if there be any such property, it would be affected by the provisions of the will. *Wade* v. *Holbrook*, 2 Redf. 378. Nor can the trustee do any act in contravention of the trust. Thus, he cannot, contrary to the trust, reconvey to the creator thereof. *Gilchrist* v. *Stevenson*, 9 Barb. 9 (15); *Briggs* v. *Davis*, 20 N. Y. 16, s. c. 21 N. Y. 574; *Scott* v. *Rand*, 115 Mass. 104, s. c. 118 Mass. 215. The trust, therefore, cannot be escaped from. Thus, after title passes, the fact that an existing policy of insurance is continued in the name of the grantor, does not rebut the trustee's title. *Bliss* v. *West*, 58 Hun, 71 (74), aff'd 132 N. Y. 589. Also *ante*, end of § 82. Nor will any subsequent events invalidate the title once validly transferred. *Roberts & Co.* v. *Buckley*, 145 N. Y. 215 (228). So where title has once passed to the trustee, it cannot be defeated by declarations of the creator of the trust, that he knew, in purchasing the property in question from plaintiff, that he was then insolvent, such declarations having been made to another creditor, after ordering the property but before the delivery and before the assignment. *Vidvard* v. *Powers*, 34 Hun, 221; *Truax* v. *Slater*, 86 N. Y. 630. As to subsequent declarations by the creator of the trust see also *Von Sachs* v. *Kretz*, 72 N. Y. 548; *Bullis* v. *Montgomery*, 50 N. Y. 352; *Flagler* v. *Wheeler*, 40 Hun, 125; *Flagler* v. *Schoeffel*, 40 Hun, 178; *Church* v. *Howard*, 79 N. Y. 415 (419); *Bliss* v. *West*, 58 Hun, 71, aff'd 132 N. Y. 589; *Coyne* v. *Weaver*, 84 N. Y. 386 (392). The deed cannot be reformed at the request of the beneficiary. *Grout* v. *Van Schoonhoven*, 1 Sandf. Ch. 336 (340). So in case of a will, the trust is or is not valid at testator's death. If not, it can-

not be validated by subsequent acts of the executor. If it is valid, subsequent acts cannot invalidate it. *Butler* v. *Green*, 65 Hun, 99 (111). On the other hand, a devise of land, in trust, does not go into effect *until* testator's death. Prior to that time, he may not only revoke the devise, but may dispose of the land and thus leave nothing for the devise to act on. If he sells the land, the proceeds do not, at his death, pass to the trustee. *Philson* v. *Moore*, 23 Hun, 152. Where A takes out a policy of insurance on his life, payable to B in trust for C, the fact that the insured has possession of it gives no right to the company to alter it at his request. *Butler* v. *State M. L. A. Co.*, 55 Hun, 296 (302), aff'd 125 N. Y. 769. The result would be the same even if the trustee consented. *Id.* (301). A sale by a trustee, for an inadequate price, cannot be set aside by the court on motion made by the creator of the trust. *Matter of Rider*, 23 Hun, 91 (93). Though it seems that his interest in having his purposes carried out might be such as to sustain a regular action by him against the trustee and purchaser, based on allegations of collusion. *Id.* See 36 Hun, 23. *Cranston* v. *Plumb*, 54 Barb. R. 59. As to cases where admissions of a trustee are admissible and binding on the estate, see *Church* v. *Howard*, 79 N. Y. 415 (419). As to their effect on a co-trustee, see cases cited, *Id.*, pp. 418–419. The trustee, on appointment, becomes entitled to all muniments of title. Thus, where a mortgagor paid the amount of the mortgage and took back an assignment of it to be held merely as a muniment of title, and died, and his heir deeded the land to a trustee, the latter, and not the executor of deceased is entitled to the possession of the mortgage. *Brown* v. *Perris*, 23 Abb. N. C. 226.

(b) Trust and Executorship Distinguished.

§ 156. Whether trustee or executor.—Where a will imposes upon an executor special duties, in reference to personal property, over and above the bare settlement of the estate, the question frequently arises whether testator has actually created a technical express trust, and confided its execution to the same person who is also executor, so as to impose on him two distinct capacities, or has merely intended to enlarge the scope of the executor's duties, to be performed by the executor *as such* and

not as a technical trustee. In the latter case, the duties in question are said to be merely executorial in their nature ; to be performed by the executor *virtute officii*, and to be enforced accordingly ; while in the other case, they are distinct from the executorial office, and are personal, and are to be enforced on the theory of an express trust.[1] The real question involved is, whether, in a given case, there are in effect two distinct personalities—that of executor and that of trustee—their merger in one individual being immaterial and accidental ; or whether there is an executor only, and no trustee ; the executor acting *as such* in all matters, but with enlarged powers, duties, and responsibilities. The question, of course, so far as an express trust, as distinguished from a power in trust, is concerned, only arises where the property involved is personal. It cannot be any part of an executor's duties, regarded either as inherent or as enlarged by the terms of the will, to take title to land under a devise in trust. If land be devised to an executor in trust, he must take it in a distinct capacity as trustee. Thus, in such a case, he is succeeded not by an administrator with the will annexed, but by a trustee ; the administrator succeeds merely to the executorship. *Dunning* v. *Ocean Nat. Bank*, 61 N. Y. 497. An executor as such, however, may hold a power in trust, which will devolve on his successor in the executorship. See *post*, § 604.

[1] The line of distinction just stated is often blurred by the fact that even the latter class of cases may, under the terms of the will, fall into three groups—namely, (*a*) cases where the two distinct capacities are intended to go along together as long as they exist, so that whoever is the executor, or administrator, at any given time, shall, by virtue of that fact, be also the trustee, and (*b*) cases where the two capacities are so far distinct that when a vacancy occurs the court may, or may not, in its discretion, appoint the same person to both positions, and where, even if it does appoint the same person, it appoints him to fill each vacancy by a separate provision. A test of this latter distinction is furnished when, at the death of the executor, the question arises whether the administrator with the will annexed, appointed by the surrogate to succeed the executor, becomes, merely by virtue of his letters of administration, the successor of the trustee also, or whether he must also be appointed by the same court or the Supreme Court as trustee. *Earle* v. *Earle*, 93 N. Y. 104 (109). (*c*) A third group exists where the trust capacity belongs solely to the first appointee as an individual, and to nobody else, so that if he refuses to act, or dies, or is removed or resigns, the trust ceases, and there can be no successor at all.

The questions raised in a given case, therefore, are, first, whether a techni-

§ 157. **Attached to executorial office.**—Where the execution of a trust is confided to executors as such, and if they take out letters, they thereby also accept the trust. *Earle* v. *Earle*, 93 N. Y. 104 (110). And they cannot be removed from the trusteeship save by revocation of their letters testamentary. *Wood* v. *Brown*, 34 N. Y. 337; *Matter of Hood*, 98 N. Y. 363; *Matter of Hood*, 104 N. Y. 103. And such revocation does effect a removal in both capacities. *Johnson* v. *Lawrence*, 95 N. Y. 154 (164); *Matter of Hood*, 98 N. Y. 363. Compare Code C. P., § 2819. The trust, upon the removal, resignation, or death of an executor, or his failure to qualify, devolves on the other executor, if any, otherwise upon an administrator with the will annexed of the original testator. *Earle* v. *Earle*, 93 N. Y. 104 (108); *Matter of Clark*, 5 Redf. 466; *Bingham* v. *Jones*, 25 Hun, 6 (10); *Matter of Stevenson*, 3 Pai. 420. Compare *Matter of Hecht*, 71 Hun, 62. L. 1882, ch. 185. *Matter of Post*, 2 Con. 243 (247). Code, § 2514, subd. 6.

§ 158. **Separable.**—When the trust is not attached to the office of executor, the person named may renounce the executorship and accept the trust, or renounce the trust and accept the executorship. *Dunning* v. *Ocean Nat. Bank*, 61 N. Y. 497; *Green* v. *Green*, 4 Redf. 357; *Judson* v. *Gibbons*, 5 Wend. 224 (228); and may, if he has accepted both positions, be removed from one, and allowed to retain the other. *Quackenboss* v. *Southwick*, 41 N. Y. 117; *Deraismes* v. *Dunham*, 22 Hun, 86; *Wood* v. *Brown*, 34 N. Y. 337 (342), and cases cited; *Widmayer* v. *Widmayer*, 76 Hun, 251; Code C. P., § 2688. As to the different methods of enforcing payment, as against an executor, or against a testamentary trustee, see *Matter of Byrnes*, 2 Con. 522.

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cal trust does or does not exist (a subject discussed *post*, §§ 160, 161); and, second, if such a trust exists, whether it is, as the saying is, "attached to the executorial office," so as to go with it into the hands of successors, or is personal to the trustee so as to pass, if it passes at all, to a new trustee as such. On this latter point, the general test is based on the distinction between trusts involving confidence in the discretion of the trustee as such, and trusts not involving the exercise of discretion, and given to the executor as such, and not as a matter of personal confidence. *Earle* v. *Earle*, 93 N. Y. 104. The distinction between these various classes and subdivisions is often obscure.

§ 159. **Basis of distinction.**—The testator may, of course, to a large degree, decide for himself and set forth in terms whether given duties not necessarily executorial shall be imposed on the executors *virtute officii*, or on the same individuals personally, in a distinct trust capacity. If his purpose is not clearly expressed, two points are of special importance in solving the difficulty: (1) the kind of title given, or required, for the performance of the "trust" duties; and (2) whether the two sets of duties are concurrent or successive.

§ 160. **The title given or required.**—Every executor is in a certain sense a trustee, for he deals with the property of others confided to his care. But he is not a trustee in the sense in which that term is used in equity. To constitute a "testamentary trustee" in a technical sense, it is necessary that some express trust be created by the will; merely calling an executor a trustee does not make him such. *Matter of Hawley*, 104 N. Y. 250 (261). The proper duties of an executor are to collect in the personal property; turn it into cash, except as otherwise directed by the will, or by statute in special cases; to effect the sale of land in certain cases covered by statute; to pay debts, and legacies, and distribute the residue, if any. *Wood* v. *Brown*, 34 N. Y. 337 (339). Under legacies, payable by the executor, are included legacies payable in annual instalments, or annuities, where there is merely a gift thereof to the annuitant, or a direction to the executor to pay them, without devising or bequeathing to the executor the property from which they are to be paid. *Clark* v. *Clark*, 147 N. Y. 639 (644). In order to enable him to perform these duties, an actual title is required, for he must be enabled to endorse paper held by testator, bring suits, sell property, and do other acts involving ownership. Now the title executors need for these purposes, they derive not, like legatees, under a bequest given by the will, but directly from the law, which clothes them, by virtue of their appointment to the office, with a peculiar and purely legal title adapted to the end to be attained, and having no further scope or force. *Lockman* v. *Reilly*, 95 N. Y. 64 (72). A trustee, on the other hand, derives his title exclusively from the terms of the will, which must, either expressly or by implication, bequeath the property to him, subject

to the trust. *Id.* In other words, to constitute an executor a technical trustee, the will must give the property to him as a legacy, to hold in trust. If there are two or more executors, and their only title is such as the law gives to an executor, as such, to perform the purely executorial duties imposed on him by law or by the will, either of them may act separately, without the others ; but if the property has, expressly or by implication, been *bequeathed* to them, in trust, then their title is entirely different, being that of legatees (in trust), and being full joint owners, under the bequest, they must, in general, all join. An executor, deriving his title by force of the local law, can sue, upon claims resting wholly in his representative character, only in jurisdictions where he has taken out letters ; *Ulster Co. Savings Inst.* v. *Fourth Nat. Bank*, 8 N. Y. Supp. 162 ; *Stewart* v. *O'Donnell*, 2 Dem. 17 ; *Johnson* v. *Wallis*, 112 N. Y. 230 ; while a trustee, deriving his title directly by bequest, under the will, is recognized everywhere as an owner, entitled to bring suit. Further illustrations may be found in a note in 26 Abb. N. C., p. 309 ; *Bliven v. Seymour*, 88 N. Y. 469 (477) ; *Tyson* v. *Blake*, 22 N. Y. 558 ; *Gilman* v. *Reddington*, 24 N. Y. 9 (18) ; *Livingston* v. *Murray*, 68 N. Y. 485 ; *Everitt* v. *Everitt*, 29 N. Y. 39 (72, 77) ; *Matter of Shipman*, 53 Hun, 511 (513) ; *Wells* v. *Knight*, 5 Hun, 50 ; *Smith* v. *Van Ostrand*, 64 N. Y. 278 ; *Matter of Yates*, 99 N. Y. 94 ; *Matter of Murphy*, 144 N. Y. 557.

It is, however, true that mere words of bequest do not necessarily turn an executor into a trustee. A bequest to executors to pay debts and legacies, might hardly, without more, be taken as indicating even an intention to vest in them any other title than the law would give them as executors. It is probably only when some duty other than the mere collecting of assets, and payment of debts and legacies is imposed, or when they are to hold property for a longer period than the mere prompt settlement of the estate would in itself require, that the question of a technical trust would arise. See *Matter of Hecht*, 71 Hun, 62.

Where testator gives to a third party the use of certain property for life, and does not vest the title thereto in the executor in trust, and the property is such that it may be enjoyed without possessing the corpus, here the executor holds the corpus as

executor, and in the same capacity pays over the income. The legatee for life is in such cases entitled to custody on giving a bond, but not otherwise. *Matter of McDougall*, 141 N. Y. 21 ; *Tyson* v. *Blake*, 22 N. Y. 558 ; *Livingston* v. *Murray*, 68 N. Y. 485 ; *Smith* v. *Van Ostrand*, 64 N. Y. 278 (282) ; see 2 Perry on Trusts, § 547 ; *Matter of Gillespie*, 17 Abb. N. C. 340. Except that if he is himself the executor, he need not give security. In such case the custody is theoretically not transferred. *Estate of Shipman*, 23 Abb. N. C. 101 ; 53 Hun, 511. For a case where the right of the life tenant to custody was established by a decree which, after the fund had been lost, was modified by requiring security, see *Hitchcock* v. *Peaslee*, 145 N. Y. 547. In somewhat similar cases, testator may vary the result by either bequeathing the property to the executor, expressly or by implication, upon a technical trust ; or, on the other hand, he may confide the custody of the corpus to the legatee for life, with right to use the same, with remainder over ; such provisions are not inconsistent, *Smith* v. *Van Ostrand*, 64 N. Y. 278 (281) ; the legatee is then, during life, a trustee of the corpus, for the remainderman, and is entitled to the custody without giving a bond. And this is still so though the life tenant is given conditional power of consuming the principal, *e.g.*, so far as necessary for his support. He is still trustee of the property for the remainderman, in so far as not thus needed. *Smith* v. *Van Ostrand*, 64 N. Y. 278 ; *Flanagan* v. *Flanagan*, 8 Abb. N. C. 413 ; *Matter of Fernbacher*, 17 Abb. N. C. 339 (and cases cited in 141 N. Y. 27) ; *Matter of James*, 146 N. Y. 78. So a life estate in real property may be devised, with power in the devisee to sell, and consume the proceeds so far as needed for support, with a valid remainder over of what may be left. *Terry* v. *Wiggins*, 47 N. Y. 512. If the power of disposition were absolute, the devisee of the life estate would take a fee. (*Post*, § 565.) So in personal property, if the absolute and unlimited power of disposition both during life and by will is given to the first legatee, a remainder over of what may be left is repugnant and void, and the primary gift is absolute and charged with no trust. *Campbell* v. *Beaumont*, 91 N. Y. 464 ; *Trustees* v. *Kellogg*, 16 N. Y. 83 ; *Van Horne* v. *Campbell*, 100 N. Y. 287 (299) ; *Hermance* v. *Mead*, 18 Abb. N. C. 90 ; *Cohen* v. *Cohen*, 4 Redf. 48.

§ 161. Duties concurrent or successive.—In cases where special duties are imposed on the executor, and it is difficult to determine whether or not it was intended to impose them upon him in a distinct capacity as trustee, and to make him a legatee of the property affected, in trust, it may sometimes be of assistance to consider whether the duties in question, and the ordinary executorial duties, are concurrent or successive. For while, if they are concurrent, the difficulty is not removed, yet if they are obviously and necessarily successive, so that, as to the property in question, the executorial duties are first to be completely performed, before it is to be turned over by the executor as such, to himself as trustee, it is generally clear that the intention was to have him hold, in the latter capacity, as a legatee on a technical trust.

There are cases where the duties of the executor are to be first completely performed ; thereupon, he is to turn the fund over to himself to hold distinctly as trustee. It is in such cases, in view of the entirely distinct nature of the successive capacities, that double commissions are allowed, first to the executor, as such, and then to the trustee, as such ; and the cases on that point, cited *post*, § 314, furnish many illustrations of the presence or absence of these successive capacities. Also *Matter of Hood*, 98 N. Y. 363 ; *Matter of Beard*, 77 Hun, 111 (113). Now in such case, when the severance has been effected, there can, thereafter, arise no question as between two capacities. Thereafter, the executor, as such—even if his official existence still continues for any other purpose—has nothing to do with the trust fund ; and the trustee is such only, and nothing else, so far as concerns that fund. *Cline* v. *Sherman*, 144 N. Y. 601. And in case of a vacancy, the proper course is, to secure the appointment not of an administrator with the will annexed, but of a trustee, to succeed to the trust. *Holden* v. *N. Y. & E. Bank*, 72 N. Y. 286 ; *Matter of Roosevelt*, 5 Redf. 601 (622) ; *Matter of Mason*, 98 N. Y. 527 (535) ; *Bonilla* v. *Mestre*, 34 Hun, 551 ; *Kortright* v. *Storminger*, 49 Hun, 249 ; *Matter of Hecht*, 71 Hun, 62. Though where there is any doubt involved, the new appointee should be constituted both trustee and administrator with the will annexed, so that he may act in both capacities. *De Peyster* v. *Clendining*, 8 Pai. Ch. 295 (310), aff'd 26 Wend. 21.

Thus far we have considered the case where executorial and trust duties were successive in that the executor was to entirely settle the whole estate before turning anything over to himself to hold distinctly in trust. But there are other cases, where the trust relates only to certain portions of the estate, in which the executor, before completing his executorial duties as to other portions, may set off the trust fund, turn it over to himself in trust, and effect a complete devolution as to this separate fund. In such cases, the same principles apply. After such separation and transfer, the executorial duties have ceased, as to the fund in question, and the trustee holds as such, and not as executor. So it may happen that one is first to act as trustee, as to a given duty, as, to pay an annuity as trustee, while a certain trust lasts, and then, when the general trust has ceased, to continue to perform that particular duty, as, to pay the annuity, as executor. *Clark* v. *Clark*, 147 N. Y. 639 (644). Now in these classes of cases, where one set of functions have ceased, and the other have begun, either as to the whole estate, or as to a fund in question, the trust is, thereafter, separate and distinct from the executorial office. *Matter of Hood*, 98 N. Y. 363. The executor always takes a certain title, and has certain duties, at first; and in order to have a set of duties personal to the trustee, as legatee in trust, and not merely attached to the duties of the executorial office, there must always come a time when the one ceases and the other begins. *Lockman* v. *Reilly*, 95 N. Y. 64 (72); *Matter of Hammond*, 92 Hun, 478 (481). Of course it often happens, where the functions are thus separable, that there are some trust functions to be performed before the separation. It also often happens that though for the time being they are thus attached, the will contemplates a future separation. Afterward, and when the time comes for a distinct and separate trust, there must be a further devolution, either to the same or to a different person, as trustee. Of course the testator may so frame his will as to provide that in any event the same person must exercise both functions, either in one capacity, or in two capacities, or even that the trust function, as such, shall absolutely cease if the person named in the will ceases to be executor.

(c) *Incidents and Results of Title.*

§ 162. **Nature of the title.**—It is of the first importance to notice that the trustee's title is of a twofold character. (1) He is vested with the entire title. (2) That title is "subject to the execution of the trust." On these two principles hang all the laws affecting his powers, duties, liabilities and rights. Thus, so far as the mere legal title goes, the trustee stands, toward outsiders, and in matters not openly involving the presence or effect of the trust, in the same position as that of any other owner. But in his relations with the beneficiaries, and in all matters in which the trust itself is an element, his title is qualified, circumscribed and colored by the fact that it is "subject to the trust."

§ 163. **Parties.**—Striking illustrations of the distinction just stated, are furnished by the authorities which discuss the question of parties, and determine when the trustee is to sue or be sued alone, and when the beneficiaries are proper or necessary parties. A detailed examination of this branch of the law of procedure would not fall within the scope of the present book, but, in brief, the following principles are established: "The general rule is, that in suits respecting trust property, brought either by or against the trustees, the *cestuis que trust* as well as the trustees are necessary parties. Story's Eq. Pl., § 207. To this rule there are several exceptions. One of them is, that where the suit is brought by the trustee to recover the trust property or to reduce it to possession, and in no wise affects his relation with his *cestuis que trust*, it is unnecessary to make the latter parties." *Carey* v. *Brown*, 92 U. S. 171. Hill on Trusts, pp. 274, 545, classifies the various cases. In Ames' "Cases on Trusts," 261 *et seq.*, there is an elaborate classification and citation of English and American authorities. Also Foster's Fed. Prac., chap. 3; Story, Eq. Pl., chap. 4; 2 Perry on Trusts, chap. 29.

§ 164. **Illustrations and qualifications.**—Without entering upon a general discussion of the subject, attention may be called to the illustrations below referred to, and also to the provision of the Code of Civil Procedure (§ 449) that "every action must be prosecuted in the name of the real party in interest, except

that . . . a trustee of an express trust . . . may sue, without joining with him the person for whose benefit the action is prosecuted." The term trustee of an express trust is here used in a very broad sense, for in addition to its usual technical meaning, the same section defines it as including a person with whom or in whose name a contract is made for the benefit of another. This provision is permissive. It does not forbid an action by beneficiaries, or by beneficiaries and trustee together, in cases where such a course would, in the absence of the statute, be appropriate or permissible. *Hubbell* v. *Medbury*, 53 N. Y. 98 (102–3); compare *Clark* v. *Fosdick*, 118 N. Y. 7 (12). Within the principles above stated, and in view of the trustee's legal title, it is he who is the person to sue for specific performance of defendant's agreement with him to buy land, *Munro* v. *Allaire*, 2 Cai. Cas. 183; bring suit to reduce trust property to possession, or subject it to his control, *Matter of Straut*, 126 N. Y. 201; sue to recover past damages to realty to which he holds title, *Lindheim* v. *Manhattan Railway Co.*, 68 Hun, 122; *McLean* v. *Macdonald*, 2 Barb. R. 534; and where a trustee is a resident of New York, he stands like any other resident in respect to his right to sue a foreign corporation here, under § 1780 of the Code. *Palmer* v. *Phœnix M. L. I. Co.*, 84 N. Y. 63 (67).

When a suit in which a trustee appears as a party is based on his ownership of a *res*, it follows that being the owner, the question of his "capacity"—whether personal or representative—is often immaterial. *Bromley* v. *Mitchell*, 155 Mass. 509; *Odd Fellows &c.* v. *McAllister*, 153 Mass. 292; *Mason* v. *Pomeroy*, 151 Mass. 164. Thus, where he sues to recover trust property, or damages for conversion, he sues in his own right (in one sense, and from a *legal* point of view), as the legal owner. *Toronto &c. Co.* v. *C. B. & Q. &c. Co.*, 123 N. Y. 37. Therefore, in such a case he may (unlike an executor, *Palmer* v. *Phœnix M. L. I. Co.*, 84 N. Y. 63 (67), cf. 70 N. Y. 81) sue out of the jurisdiction where the will was proved, without having it proved where he sues, or securing any new authority for the purpose. He can, like any owner, prove his title in the action. (*Id.*) Compare *Bingham* v. *Marine Nat. Bank.*, 112 N. Y. 661. (As to whether this rule is qualifed where it might inure to injury of domestic creditors, see *Toronto &c. Co.* v. *C. B. & Q. &c. Co.*,

supra.) The trustee of an express trust of land stands in the same position as the testator, in regard to right to sue for continuing damage to the land. Even in a case where a purchaser from the testator would for any reason be in a less favorable position than his grantor, a trustee is not for any such purpose to be held a purchaser. He represents all the rights of the testator. *Mortimer* v. *M. R. Co.*, 129 N. Y. 81 (84–5). See *Kernochan* v. *N. Y. E. R. R. Co.*, 128 N. Y. 559. If one buys property from a trustee, he cannot defend an action for the price on the ground that he, as a party to the trust agreement, was drawn into it by fraud. He is not sued as a member of the trust arrangement, but as a purchaser of property. Thus, where a corporation and its creditors make a "liquidation agreement," under which trustees are appointed, who thereafter as trustees sell property to one of the creditors and take his promissory note, in an action on the note, by the trustees, a defence alleging that defendant was induced to become a party to the agreement by fraudulent representations of the corporation, its agents, officers and directors, and asking that the agreement be set aside and cancelled as to him, is demurrable. This is no reason why he should not pay for the property he bought. *Otis* v. *Shants*, 128 N. Y. 45.

So it is the trustee and not the beneficiary, who is subject to liability for any nuisance for which a beneficial holder of the same title would be liable. *Schwab* v. *Cleveland*, 28 Hun, 458; *Norling* v. *Allee*, 10 N. Y. Supp. 97; 13 *Id.* 791; 131 N.Y. 622; *People* v. *Townsend*, 3 Hill, 479; *Ahern* v. *Steele*, 115 N. Y. 203. And one who holds possession adversely to him may thus acquire title against him, and the beneficiaries, and others interested in the property, under the same circumstances in which he would thus gain title by adverse possession if the trustee's estate had been held beneficially and not in trust. *Bennett* v. *Garlock*, 79 N. Y. 302 (319–320). For numerous authorities relating to the trustee's liability on burdens incident to ownership, see Ames' "Cases on Trusts," 279, and note.[1] And taxes should be as-

[1] Where one brings a suit in equity to compel defendant to convey to him land alleged to be held by defendant as trustee for plaintiff, and plaintiff is defeated, he has not, under § 1525 of the Code of Civil Procedure, a right to a second trial. That section does not apply to such a case. *McConnell* v. *McCullough*, 47 Hun, 405.

sessed against the trustee as such. Tax Law, § 32. See *post*, § 285. *Trowbridge* v. *Horan*, 78 N. Y. 439 ; *Matter of Kenworthy*, 63 Hun, 165. See *People ex rel. Pike* v. *Barker*, 86 Hun, 283. In short, in cases falling within the foregoing principles, the trustee, whether plaintiff or defendant, stands as the representative of the beneficiaries, *Wetmore* v. *Porter*, 92 N. Y. 76, in so far as concerns the estate held by him. *Pray* v. *Hegeman*, 98 N. Y. 351 (361) ; *Kip* v. *Hirsh*, 103 N. Y. 565 (569–570). As to suits to foreclose a mortgage on trust property, see *Lockman* v. *Reilly*, 95 N. Y. 64 ; *U. S. Trust Co.* v. *Roche*, 116 N. Y. 120 (130).

Under the diverse citizenship clause of the Federal judiciary act, it is the citizenship of the trustee, if he is the proper party, and not that of the beneficiary who is not a party, which determines the right to sue in the federal courts. *New Orleans* v. *Gaines*, 138 U. S. 595 (606) ; *Morris* v. *Lindauer*, 54 Fed. R. 23. But if a trustee refuses to sue (even if only on the ground that as he is a citizen of the same State as defendant, he must sue, if at all, in a State Court, which he declines to do) the beneficiary may not only bring suit himself, but, if he is a citizen of another State, he may, by virtue of that fact, sue in the federal courts. For, as he, instead of the trustee, is the party, it is his citizenship that counts. *Bowdoin College* v. *Merritt*, 63 Fed. R. 213.

On the other hand, it follows, from the fact that a trustee holds the title not beneficially, but in trust, that his wife acquires no right to dower. *Germond* v. *Jones*, 2 Hill. 569 (573) ; *Terrett* v. *Crombie*, 6 Lans. 82, aff'd 55 N. Y. 683 ; *Cooper* v. *Whitney*, 3 Hill, 95.[1] The trustee's will, whether general, or referring to the trust property in particular, cannot pass any title (unless in execution of a "power" to do so), because upon the trustee's death the title, if the trust continues, vests in survivors,

[1] In New York, no question concerning dower right in the widow of a *beneficial* owner of the fee in possession, where the legal title is in a trustee, can arise, because no such equitable title exists, under express trusts. If the trust is such as to give the trustee a fee, his title is the only title there is, the beneficiary having a mere right to enforce the performance of the trust. If the trustee holds less than a fee, the same thing applies as to that estate, and as to the remainder, it is not an estate in possession.

or, by statute, in the Supreme Court. Real Prop. L., § 91; L. 1882, chap. 185. And so also in a suit by the beneficiaries against him to enforce the performance of the trust, he cannot set up his title in defence; Real Prop. L., § 80; and an assignment by him of "all *his* property," does not carry to the assignee the property held in trust, *Brown* v. *Decker*, 21 Hun, 199; 1 Perry on Trusts, § 345. If the facts are such that legal title to trust property passes to the assignee for creditors of the trustee, *e.g.*, where it has been converted by the trustee and invested by him personally in his own name, the assignee's title is subject to the trust, if the trust property can be clearly traced into particular property which he holds, but not otherwise. 1 Perry on Trusts, § 345; Ames' "Cases on Trusts," 393, citing (among other cases) *Matter of Howe*, 1 Pai. Ch. 125, 128; *Griffin* v. *Marquardt*, 17 N. Y. 28; *Van Hensen* v. *Radcliff*, 17 N. Y. 580; *Coates* v. *First Bank*, 91 N. Y. 20. While an actual beneficial owner, who makes a nominal transfer of property, to keep it out of the hands of creditors, or takes title to property purchased by him, in the name of a third party, for the same purpose, is left without remedy against the nominal grantee who refuses to reconvey to him, *Robertson* v. *Sayre*, 134 N. Y. 97, yet if a trustee does the same thing, for the same purpose, he may maintain a suit to recover the property for the benefit of the trust estate from the nominal grantee. *Place* v. *Hayward*, 117 N. Y. 487 (496); *Wetmore* v. *Porter*, 92 N. Y. 76. His successor may sue where his predecessor might if still acting, even if the right relied on is a title nominally in the predecessor as trustee. As he held *as trustee*, the individual personal capacity that happens to be behind the official title is immaterial. Thus, a successor may sue for conversion of a note or check drawn to his predecessor. *Robinson* v. *Chemical Nat. Bank*, 86 N. Y. 404, and if the note or check is drawn to one trustee, it belongs to all, and also to successors. *Id.*

Where one of the trustees has illegally transferred trust stock to pay a personal debt, the trustees, including the one who thus acted wrongfully, may themselves—as trustees—sue to set aside the transfer. *Onondaga T. & D. Co.* v. *Price*, 87 N. Y. 542 (549–50). So where trustees give an illegal bond against public policy, and use funds of the estate as collateral to secure their

surety, they are not, in their trust capacity, *in pari delicto*, and may sue for cancellation of the bond, and recovery of the collateral, in the interest of the trust estate. They are acting merely as representatives of innocent persons, and equity may properly aid them. *Zimmerman* v. *Kinkle*, 108 N. Y. 282 (287). So where trust property is wrongfully converted, the trustee as such, though he had personally been in collusion with the defendant therein, may sue to recover the assets or for conversion ; the wrongful taker is responsible to the guilty trustee, as well as to the beneficiary. *Wetmore* v. *Porter*, 92 N. Y. 76 ; *Lee* v. *Horton*, 104 N. Y. 438.

Such being the position of the trustee, it follows that the beneficiary, having no title, cannot represent the trust estate as against third parties in a suit respecting the *res*. *Western R. R. Co.* v. *Nolan*, 48 N. Y. 513. Thus, he cannot, in his right as beneficiary, maintain a suit to partition the estate held in trust. *Harris* v. *Larkins*, 22 Hun, 488 ; and in a suit against a trustee, in ejectment, a beneficiary not in possession need not be made a party. *Van Voorhis* v. *Kelly*, 31 Hun, 293 (297). So in a suit against the trustee to recover for services rendered to the trust estate. *Stanton* v. *King*, 8 Hun, 4, aff'd 69 N. Y. 609. A decree for partition, obtained by a beneficiary as such, as plaintiff, would not estop a trustee though a party to the suit. *Harris* v. *Larkins*, 22 Hun, 488 ; though if the theory of the action was that the trust was invalid, and its extinguishment was sought, the result would be otherwise, if all parties were before the court. *Id.*, p. 490. But where, in a suit by one of several beneficiaries against the trustee, the point is that a defendant has filed and passed his account, and holds a specific fund belonging to plaintiff, under the surrogate's decree (apparently on the theory that the trust as to plaintiff and her share has been terminated by her attainment of her majority) and that he has refused to account to plaintiff, and has threatened to bring a suit for construction, and that no such suit is necessary—a demurrer for lack of parties in failing to bring in the other (infant) beneficiaries is improper and will be overruled. *Hitchcock* v. *Linsly*, 17 Hun, 556 ; compare 36 Hun, 405. And where a claim exists for accrued income, against a trustee who has been removed, or against the estate of a deceased trustee, it is the beneficiaries,

and not the successor of the trustee, who should sue. *People ex rel. Collins* v. *Donohue*, 70 Hun, 317 (324)

On the other hand, where a suit is not of the class already illustrated, and falls within the general rule relating to parties, the beneficiary as well as the trustee is a necessary party. *Matter of Straut*, 126 N. Y. 201, and cases cited.

§ 165. **Trustee's refusal to sue.**—But when a suit is such that it *should*, under the principles already stated, be brought by the trustee, there are contingencies in which the beneficiaries may nevertheless proceed themselves as plaintiffs in his stead. Thus, if the trustee refuses on demand, to sue. *N. T. Bank* v. *Wetmore*, 124 N. Y. 241 (251); *Richardson* v. *Thurber*, 104 N. Y. 606; *Davies* v. *N. Y. Concert Co.*, 41 Hun, 492; *Western R. R. Co.* v. *Nolan*, 48 N. Y. 513; see *Harvey* v. *McDonnell*, 113 N. Y. 526; *C. Riessner & Co.* v. *Cohn*, 22 Abb. N. C. 312; *Weetjan* v. *Vibbard*, 5 Hun, 265, and cases cited; see *Hubbell* v. *Medbury*, 53 N. Y. 98 (102); *Bowdoin College* v. *Merritt*, 63 Fed. R. 213, and cases cited. Or if a request to the trustee to sue would be futile. *Ettlinger* v. *P. R. and C. Co.*, 142 N. Y. 189. But in a suit by the beneficiary based on the trustee's refusal to sue, the general nature and purpose of the proceeding must be the same as if the trustee were suing. One beneficiary, for example, cannot base upon the trustee's refusal to sue on behalf of all the beneficiaries, a right to sue for his own personal advantage, in hostility to the scheme of the trust which contemplates the benefit of the others also. *Crouse* v. *Frothingham*, 97 N. Y. 105 (113 *et seq.*). And it must be made clear that the demand on the trustee was to bring a suit for the same purpose as that for which the suit in question is brought, and on behalf of the same parties. *Lindheim* v. *Manhattan Railway Co.*, 68 Hun, 122. So if, being a party, the trustee refuses to appeal, it is his duty to allow the beneficiary to use his name for a review of an adverse judgment. *Bockes* v. *Hathorn*, 78 N. Y. 222 (227). The refusal to sue may be inferred from his conduct in effecting a gross breach of trust and incapacitating himself from effectively prosecuting a suit to reinstate the beneficiaries in their rights. *Kirsch* v. *Tozier*, 63 Hun, 607 (611), aff'd 143 N. Y. 390 (397). In all such cases, the trustee must be made a

party defendant. *N. T. Bank* v. *Wetmore*, 124 N. Y. 241 (251).

§ 166. **When bound by decree.**—If beneficiaries, when proper parties, are duly brought in, though infants, and duly represented, they are as much bound by a decree as adults. *Matter of Hawley*, 100 N. Y. 206; *Mutual L. I. Co.* v. *Schwaner*, 36 Hun, 373 (377–8), aff'd 101 N. Y. 681; compare *Moore* v. *Appleby*, 36 Hun, 368, aff'd 108 N. Y. 237. A trustee is, of course, bound like other litigants, by the rule of *res adjudicata* in a case where he was duly and properly made a party. *McCarty* v. *Terry*, 7 Lans. 236 (240). But in order that a trustee be bound by a prior decree, he must have been a party as trustee, in the prior suit. *Fisher* v. *Hubbell*, 7 Lans. 481 (485); see 65 Barb. R. 74. A judgment against one as an individual is not an estoppel in a subsequent suit by or against him as trustee. *Rathbone* v. *Hooney*, 58 N. Y. 463 (467). And a former judgment in favor of a trustee as such, is not a bar to an action against him personally. *Hall* v. *Richardson*, 22 Hun, 444 (446), aff'd 89 N. Y. 636. A former judgment concludes a party only in the character in which he was sued, and therefore a judgment for or against a trustee, executor, administrator, or assignee as such, does not preclude him, in a different cause of action affecting him personally from disputing the findings or judgment though the same questions are involved. *Collins* v. *Hydorn*, 135 N. Y. 320 (324), citing Wells on Res Adjud., p. 16, § 21; *Rathbone* v. *Hooney*, 58 N. Y. 463; *Landon* v. *Townshend*, 112 N. Y. 93; Bigelow on Estop., 5th ed., pp. 130, 131; 2 Black on Judgments, § 536; 2 Phill. on Evid., 3d ed., pp. 8, 9, ch. 1, § 1, sub. 1; *Duchess of Kingston's Case*, 2 Smith's L. C., p. 792; *Leggett* v. *G. N. R. Co.*, L. R. (1 Q. B. Div.) p. 606; *Lander* v. *Arno*, 65 Maine, 26. Of course a judgment *in rem* is conclusive against all the world. *Collins* v. *Hydorn*, 135 N. Y. p. 326. It may be true, however (and is quite consistent with the foregoing statements) that although a trustee may not have been named *as such* in the pleadings and judgment in the prior suit, yet he may *as such* be bound by the result, if it in fact appeared on the face of the proceedings in the prior suit that he was there a party in his representative capacity. But

unless it so appears, the judgment is not binding on him as trustee, in a subsequent suit. *Landon* v. *Townshend*, 112 N. Y. 93 ; s. c. 129 N. Y. 166 (174–5). The case of *Wagner* v. *Hodge*, 34 Hun, 524, aff'd 98 N. Y. 654 without opinion, is not *contra*. What was really decided in the latter case related to the rights of a *bona fide* purchaser of real estate. The judge in the court below, in the course of his remarks, said that probably the rights of the assignee were cut off by the judgment in foreclosure in that case ; but the effect of such judgment was not there directly decided. Any implication that the trustee would be estopped by a decree in a suit to which he was made a party only individually, is disapproved in *Landon* v. *Townshend*, 129 N. Y. 166 (175–6).

§ 167. **As between trustee and beneficiary.**—The principle of *res adjudicata* also applies as between the trustee and the beneficiary. Thus, where one of several beneficiaries brought an action against the trustee, to set aside a sale made by the trustee under a power, at which the trustee himself had individually bought in the property, a judgment was entered in favor of defendant, and no appeal was taken. Subsequently, at the suit of other beneficiaries a different result was reached and a resale of the entire property was ordered. But the first beneficiary being bound, in regard to the share then held by him, and represented in the first suit, by the judgment then entered, though erroneous, could not, as to that share, participate in the benefits acquired by the others in the second suit ; as to other shares, however, acquired by the first plaintiff, subsequent to the first judgment, he would not be estopped, as he had, in respect to them, merely stepped into the shoes of the persons from whom they were acquired by him. *Boerum* v. *Schenck*, 41 N. Y. 182.

§ 168. **Res adjudicata—Unborn persons.**—Unborn persons may be bound by a decree, *Matter of Dolan*, 88 N. Y. 309 (321), even where no provision is made for them. The cases in which this rule applies, and the principles involved, are well illustrated in a recent case, where plaintiff's testator, A, left his land to trustees on a valid trust with a valid power of sale. To a part of this land he had no record title, the deed to him having been

lost and never recorded. His grantor, B, had died leaving all her land in trust for her three children for their respective lives, remainder on the death of each to his then living issue *per stirpes*. A's trustees brought an action to compel the execution and delivery of a deed of the land actually conveyed by B to A, and they made B's trustee, her three children and only heirs, and also all her grandchildren, defendants. Their prayer was granted and a deed executed and delivered. A's trustees had previously agreed with C to convey the land to him, and after obtaining record title under the decree tendered him a deed which he refused on the ground that the decree was not binding on such grandchildren of B, yet unborn, as might be living at the death of any of B's children. It was held, that the proceeding was one *in rem;* that all the persons *in esse* who might have any interest, beneficial or in trust, in B's estate, being parties, and representing the entire title, the judgment would be conclusive on after-born persons; that while those *in esse* could not by any conveyance *in pais* cut off the rights of after born grandchildren, a decree finding that the land in question did not form part of B's estate, and that neither those *in esse* nor those after born could have any interest in it, would be conclusive against those after born; that while, if the land had actually passed under the will of B, the court could not change or extinguish the title without properly providing for the protection of future interests of unborn persons, yet in this case no such provision was possible or called for, as the decree established the absence of any interest of such afterborn persons in the property. Also, where an action for construction of a will is not a proper one for that purpose, and rests only on the consent of the parties to the form, it cannot bind unborn persons; but here the action was proper for the purpose sought.

The title in A's trustees was held good, and C was compelled to take. *Kent* v. *Church of St. Michael*, 136 N. Y. 10. See also *Leggett* v. *Hunter*, 19 N. Y. 445 (460–63); *Gilman* v. *Reddington*, 24 N. Y. 9 (20); *Monarque* v. *Monarque*, 80 N. Y. 320.

§ 169. **Jurisdiction of city court.**—By sec. 316, subd. 3 of the Code of Civil Procedure, it was formerly provided that

"The (City) Court (of New York) has not jurisdiction of an action commenced against an executor or administrator in his representative capacity. But this subdivision does not prevent the court from continuing an action against an executor or administrator, or from substituting an executor or administrator in place of a defendant in an action in a case where it is prescribed in this act that a continuance or substitution may be made." This subdivision was construed in *Peo.* v. *Justices*, 81 N. Y. 500. It specifically referred only to executors and administrators, and not to trustees as such. And by L. 1889, ch. 441, it was repealed. The City Court of New York has no jurisdiction of an equitable action, *Blewitt* v. *Olin*, 13 State Rep. 76; though it may entertain equitable defences in actions at law, not involving any affirmative relief. *Mack* v. *Kitsell*, 20 Abb. N. C. 293. See also *Cushman* v. *Family F. Socy.*, 28 State Rep. 757; s. c. 36 *Id.* 856; *Homestead Bank* v. *Wood*, 1 Misc. 145; *Peo.* v. *Bd. of Excise*, 3 State Rep. 253.

§ 170. **Trustee both plaintiff and defendant.**—The same person may be a trustee of two distinct estates, and thus be acting in two distinct capacities, both representative; as to the matter of parties in such cases, compare *Neilley* v. *Neilley*, 23 Hun, 651, reversed, 89 N. Y. 352; *Matter of Dolan*, 88 N. Y. 309 (321); *Borst* v. *Corey*, 16 Barb. 136. And where he is an *executor*, there, if he as trustee has a claim against himself as executor, no suit lies, but the surrogate passes on the claim. *Neilley* v. *Neilley*, 89 N. Y. 352; *Kyle* v. *Kyle*, 67 N. Y. 400 (408); *Fisher* v. *Hubbell*, 7 Lans. 481 (484); s. c. 65 Barb. 74. See also *Popham* v. *Spencer*, 4 Redf. 399.

§ 171. **Counterclaim—Offset.**—But a defendant sued on a claim against him individually, cannot assume to himself a double capacity, and set off a debt owed to him as trustee by the plaintiff. *Foster* v. *Coe*, 4 Lans. 53 (57).

§ 172. **Trustees act jointly.**—Trustees must all join in bringing an action on behalf of the trust estate, *Anonymous* v. *Gelpcke*, 5 Hun, 245 (255); and if any refuse to join, they must be made defendants, *Thatcher* v. *Candee*, 4 Abb. Ct. App. Dec. 387; and also in every conveyance, lease, sale, agreement to

sell, etc., relating to land. *Wilder* v. *Ranney*, 95 N. Y. 7 (11, 12); *Leitch* v. *Wells*, 48 N. Y. 585 (601); *Ridgeley* v. *Johnson*, 11 Barb. R. 527; *Brennan* v. *Willson*, 71 N. Y. 502; *Moir* v. *Brown*, 14 Barb. R. 39 (45); and, in general, in giving receipts, *Ridgeley* v. *Johnson*, *supra*; *Moir* v. *Brown*, *supra*. And an attempted disclaimer by one, who has accepted the trust, and his attempted release of title to the other, does not enable the latter to give a good title. *Brennan* v. *Willson*, 71 N. Y. 502. But in selling personal property, one trustee may, it is said, give a good title to a *bona fide* purchaser. *Wilder* v. *Ranney*, 95 N. Y. 7 (12); and even as to land, the trust instrument may of course confer power upon a majority to act. *Crane* v. *Decker*, 22 Hun, 452. Even though the trust instrument effects an equitable conversion of land, the actual sale and conveyance must nevertheless be made by all the trustees, for in respect to that feature the property vested in them is still land, and must be sold and conveyed as such. *Wilder* v. *Ranney*, 95 N. Y. 7 (12). In *People ex rel. Adams* v. *Sigel*, 46 How. Pr. 151, it is held that one of two trustees might, under certain peculiar circumstances, on receiving the money secured by a mortgage held by the trustees, execute a satisfaction piece. Where trustees are given an estate to be divided and set off into shares, and another person is appointed a trustee of one of such shares, the general trustees, if empowered to lease, may lease the entire estate, *before division*, and there is no occasion for the joining of the trustee of the separate share, not yet set up. After division that separate share will be subject to the lease. *Corse* v. *Corse*, 144 N. Y. 569. Even though one of several trustees disclaims the trust, yet if he has once accepted, he must join in a conveyance with the others, unless he has been allowed by the court to resign, or has been removed. *Brennan* v. *Willson*, 71 N. Y. 502. Where there are possible objections to the full title of a trustee, arising out of resignations, or renunciations, of co-trustees or predecessors, the difficulty may be obviated by having all past and present trustees, and all persons possibly interested, unite in the conveyance. *Farrar* v. *McCue*, 89 N. Y. 139 (146).

§ 173. Trustee—How designated.—Where suit is brought

against a defendant designated "*as* trustee," and the form of the complaint, the substantive averments, and the form of the judgment demanded characterize the action as against him in his representative capacity only, and the cause of action is such as could lie against him only as an individual, the complaint will not stand, on demurrer, and cannot at that point be viewed as if intended to be a claim against defendant individually. *Austin* v. *Munro*, 47 N. Y. 360. On the other hand, if the word "as" is omitted, while it has sometimes been held (*Merritt* v. *Seaman*, 6 N. Y. 168, 172; *Sheldon* v. *Hoy*, 11 How. Pr. 11; *Worden* v. *Worthington*, 2 Barb. R. 368; *Root* v. *Price*, 22 How. Pr. 372; *Ogdensburgh Bank* v. *Van Rensselaer*, 6 Hill, 240) that without that word after the name of the party the term "trustee," "executor," etc. (see Code C. P. § 1814), is but a *descriptio personæ*, and gives him only a personal or individual character in the action, yet it is nevertheless true that the frame and averments and scope of the complaint may be such as to affix to him a representative character in the litigation. *Beers* v. *Shannon*, 73 N. Y. 292 (297); *Stilwell* v. *Carpenter*, in *Mem.* 62 N. Y. 639, reported in full in 2 Abb. N. C. 238. See also *People* v. *Prescott*, 3 Hun, 419; *Hoagland* v. *Trask*, 48 N. Y. 686. See *ante*, § 166.

§ 174. **Assignment to successor.**—Where an order directs a removed trustee to pay a balance found against him to his successor, A, that successor may assign his rights thereunder, and the funds represented thereby, to a subsequent successor, B, and the latter may procure and enforce judgment. *Stokes* v. *Amerman*, 121 N. Y. 337.

§ 175. **Successor as creditor of predecessor.**—L. 1840, ch. 80, as amended, providing that a wife might insure her husband's life for her benefit, but giving creditors of husband the benefit as to excess over $500 in any year, in premiums, paid by him, covered the case of a defaulting trustee who had been ordered by the court to pay a specified sum to his successor. The successor, by due proceedings, might acquire a right to security from the fund when it should become payable at the death of the insured, and bring suit while the insured is still living. *Stokes* v. *Amerman*, 121 N.Y. 337. See Dom. Rel. L, § 22.

(4) *The Trustee's Authority.*

§ 176. **In general.**—The trustee has implied authority to do many acts in the management of the trust property. In general, as legal owner, he is authorized to deal with the estate as if he held it beneficially, but in so far only as is consistent with the purposes for which he holds it, the best interests of the beneficiaries, the special requirements of the trust instrument, and the provisions of the statutes and the principles of the law. The trust instrument may also confer special authority upon him which he would not otherwise possess. Such authority, when it takes on the form of a technical trust power, is covered by the discussion of powers (*post*, Chap. XIII. *et seq.*).

§ 177. **To contract.**—The general rule is that the trustee has no power to charge the trust estate by his *executory* contracts, unless authorized to do so by the terms of the trust instrument. Upon such contracts he is personally liable, and the remedy is against him personally. *Kedian* v. *Hoyt*, 33 Hun, 145 ; 54 Hun, 540 ; *Lunt* v. *Lunt*, 8 Abb. N. C. 83, and cases cited in brief of appellant. The rule is the same as in the case of executors and administrators and receivers. The ground of the rule is thus stated in *Schmittler* v. *Simon*, 101 N. Y. 554, 114 N. Y. 176 : " Neither executors nor administrators have power to bind the estate represented by them, through an executory contract, having for its object the creation of a new liability, not founded upon the contract or obligation of the testator or intestate." They take personal property as owners, and have no principal behind them for whom they can contract. " The title vests in them for the purposes of administration, and they must account, as owners, to the persons ultimately entitled to distribution. In actions upon contracts made by them, however they may describe themselves therein, they are personally liable." Also, *Noyes* v. *Blakeman*, 6 N. Y. 580 ; *Ferrin* v. *Myrick*, 41 N. Y. 315 (319) ; *Mygatt* v. *Wilcox*, 45 N. Y. 306 ; *Bowman* v. *Tallman*, 2 Robt. 385 ; *Willis* v. *Sharp*, 113 N. Y. 586 ; s. c. 115 N. Y. 396 ; s. c. 124 N. Y. 406 ; *Martin* v. *Platt*, 51 Hun, 429 ; *Foland* v. *Dayton*, 40 Hun, 563 ; *Austin* v. *Munro*, 47 N. Y. 360 ; *Ryan* v. *Rand*, 20 Abb. N. C. 314 ; *Peo.* v. *Univ. L. Ins. Co.*, 30 Hun, 142 ; *L'Amoureux* v. *Van Rensselaer*, 1 Barb. Ch. 34 (38) ;

Patton v. *Royal Baking Powder Co.*, 114 N. Y. 1 (4). See *Matter of Odell*, 1 Con. 91. It follows that if the trustee personally contract for the erection of buildings upon the trust property, mechanics' liens are void. *Herbert* v. *Herbert*, 57 How. Pr. 333.

§ 178. **Same—Qualified.**—It is, however, to be noticed, that if necessary repairs are made, or work done or other services rendered, for the trust estate, the trustee may properly pay for the same, as well as pay taxes, etc., out of available funds of the estate; or out of his own funds, in which case he has an equitable lien on the trust property for reimbursement, *Rogers* v. *Wendell*, 54 Hun, 540, with interest. *Mann* v. *Lawrence*, 3 Bradf. 424. If, instead of paying voluntarily, he is sued individually, and compelled to pay, he has the same equitable lien. *New* v. *Nicoll*, 73 N. Y. 127 (131). This being so, it follows that yet another method may be adopted. "When a trustee is authorized to make an expenditure and he has no trust funds, and the expenditure is necessary for the protection, reparation, or safety of the trust estate, and he is not willing to make himself personally liable, he may by *express agreement* make the expenditure a charge upon the trust estate. In such a case he *could himself advance* the money to make the expenditure, and he would have a *lien* upon the trust estate, and he can by express contract *transfer this lien* to any other party who may upon the faith of the trust estate make the expenditure." *New* v. *Nicoll*, 73 N. Y. 127; *Noyes* v. *Blakeman*, 6 N. Y. 567. See *Stanton* v. *King*, 8 Hun, 4, aff'd 69 N. Y. 609; see also *Willis* v. *Sharp*, 113 N. Y. 586; s. c. 115 N. Y. 396; s. c. 124 N. Y. 406; *Perry* v. *Board of Missions*, etc., 102 N. Y. 99; *Van Slyke* v. *Bush*, 123 N. Y. 47 (51). But to effect a transfer of the trustee's equitable lien, an express contract to that effect is essential, and it is not sufficient that the other party, in doing work or making expenditure, did so in reliance upon his own assumption that the estate would be liable, *Rogers* v. *Wendell*, 54 Hun, 540 (547), nor that it was understood between him and the trustee that payment was to be made by the trustee out of the estate. *Stanton* v. *King*, 8 Hun, 4 (5), aff'd 69 N. Y. 609. While, on the other hand, the mere intention to look to the trust estate for compensation, or the assumption that it alone would

be liable, would not, in the absence of an express contract charging the estate and releasing the trustee personally, interfere with the right to hold the trustee individually. *Foland* v. *Dayton*, 40 Hun, 563. A transfer of liability to the estate, by an agreement, may be established as other agreements are allowed to be proved. *Id.*

In view of the foregoing principles, if a suit is to be brought against the trustees as such, or against them as individuals, the decision as to which course to adopt should be clearly settled, and the complaint drawn flatly according to the scheme decided on. While the mere addition of the words "*as* trustee," after the name of defendant where the complaint alleged individual liability, might be regarded as merely descriptive of the person, and judgment authorized against him individually, yet if the form of the complaint, and its substantive averments, and the form of the judgment demanded, characterize the action as against the defendant in his representative capacity, the action cannot, on demurrer, and in the absence of allegations showing that the estate was in fact expressly charged, be converted into one against the trustees individually.. *Austin* v. *Munro*, 47 N. Y. 360. See *ante*, §§ 166, 173.

It has been suggested, that inasmuch as services rendered, or goods sold, necessary for the trust estate, are ultimately to be paid for from the estate, it would seem to follow that while, in the absence of express contract charging the estate, an action would lie only against the trustee, yet if he were insolvent, or by fraud rendered recovery against himself unavailing, an equitable cause of action would thereby be created against the estate. *Ferrin* v. *Myrick*, 41 N. Y. 315 (325). If a trustee fraudulently induces one entitled to payment to accept worthless securities, there is a remedy in equity against the estate. See *Hasbrouck* v. *Blauvelt*, 9 Hun, 200. As to a claim of lien by an attorney representing a beneficiary, see *Matter of Hoyt*, 5 Dem. 432.

As to the lien of counsel for a trustee upon a fund recovered, and on papers, etc., see *Matter of Knapp*, 85 N. Y. 284 (297); *Austin* v. *Munro*, 47 N. Y. 360; *Ferrin* v. *Myrick*, 41 N. Y. 315; *Bowman* v. *Tallman*, 2 Robt. 385; *Boynton* v. *Laddy*, 50 Hun, 339.

§ 179. **To grant easements.**—A trustee, having the legal title, has power to grant an easement over the trust estate, to continue during the term of the trust, where such a grant is warranted by the circumstances. At least, so it is said in *Valentine* v. *Schreiber*, 3 App. Div. 235 (239). Where the power is derived from, when the trust is merely, as in that case, to receive and apply rents, it might be difficult to say. But the trustees there had also a general power of sale, and this seems to furnish a more satisfactory ground for sustaining the grant. (*Id.* 239–40.)

§ 180. **To compromise.**—A trustee, in the absence of statutory provisions, has power to compromise claims against the trust estate; but he acts at his peril; to protect himself, he may apply to a court of equity for its advice and approval. See note, 5 Abb. N. C. 346.

§ 181. **Acts in contravention of trust.**—Sec. 85 of the Real Property Law, which is now substituted in place of § 65 of the Statute of Uses and Trusts, as amended, provides that "If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee, in contravention of the trust, except as provided in this section, shall be absolutely void. The Supreme Court may, by order, on such terms and conditions as seem just and proper, authorize any such trustee to mortgage or sell such real property, or any part thereof, whenever it appears to the satisfaction of the court that it is for the best interest of such estate, or that it is necessary and for the benefit of the estate, to raise funds for the purpose of preserving and improving it; and whenever the interest of the trust estate in any real property is an undivided part or share thereof, the same may be sold, if it shall appear to the court to be for the best interest of such estate." Notice of the application for leave to sell or mortgage is also provided for in § 87 of the Real Prop. Law. But under the decisions prior to the amendments, it was held that the only acts which are forbidden are those which are in contravention of the given trust in question; that for some purposes, as to raise money to pay taxes and so avoid a tax sale, the trustee might, with the approval of the court, mortgage the

land ; and whether it is or is not in contravention is a question to be decided by the court. *U. S. Trust Co.* v. *Roche*, 116 N. Y. 120 ; see *Cruger* v. *Jones*, 18 Barb. 467, explained in *U. S. Trust Co.* v. *Roche*, *supra*, p. 128 ; *Matter of Clarke*, 59 Hun, 557 ; *Matter of Roe*, 119 N. Y. 509 ; *Fitzgerald* v. *Topping*, 48 N. Y. 438 (444) ; *L'Amoureux* v. *Van Rensselaer*, 1 Barb. Ch. 34 (37) ; *Wetmore* v. *Porter*, 92 N. Y. 76 ; *Matter of Morris*, 63 Hun, 619, 133 N. Y. 693, as to which see *Losey* v. *Stanley*, 147 N. Y. 560 (572–73).

The power in the court to authorize a sale or mortgage, only applies to raising a fund necessary to improve or preserve the trust property. It does not authorize a sale for the purpose of reinvesting the proceeds in another form. The "improvement" referred to relates to the land, and not to the total trust estate. The statute does not cover an attempt to merely utilize the proceeds of the land to better advantage. It forms an exception to the general line of the trustee's duty, and it is intended to meet emergencies. As a rule, the property is considered safer if allowed to remain as land, and the court can only authorize a sale or mortgage for the necessary preservation or improvement of the lands held by the trustee. *Matter of Roe*, 119 N. Y. 509 ; *Matter of Morris*, 63 Hun, 619, 133 N. Y. 693.

Where a trust instrument gives the power to sell or mortgage, a sale or mortgage, in accordance with its terms, is, of course, not in contravention of the trust. *Belmont* v. *O'Brien*, 12 N. Y. 394 ; *McArthur* v. *Gordon*, 51 Hun, 511 (126 N. Y. 597). (As to implied power to mortgage, see *Rogers* v. *Rogers*, 111 N. Y. 228, 238.) Where land is conveyed to a grantee "as trustee" and "to his successors and *assigns* forever," and the grant is absolute, and contains no limitation on the power to convey, and no disclosure of the nature or object of the trust, a grantee from the trustee takes a good title to the land. *G. L. & P. J. R. Co.* v. *N. Y. & G. L. R. Co.*, 134 N. Y. 435. Apart from the cases where, by proper proceedings, a valid authorization may be secured from the court, a trustee whose conveyance or mortgage would under the statute be void, cannot render it valid by securing an order or decree of court directing it. *Douglas* v. *Cruger*, 80 N. Y. 15 (18) ; *Losey* v. *Stanley*, 147 N. Y. 560 ; *Cruger* v. *Jones*, 18 Barb. 467 ; *O'Donoghue* v.

Boies, 92 Hun, 3. But § 85 does not divest the court of its power over the legal estate of infants, whether holding beneficially or as trustees, expressly conferred by 2 R. S. 194, sec. 167, for which § 2345 *et seq.* of the Code is now substituted. *Anderson* v. *Mather*, 44 N. Y. 249 (261); *Losey* v. *Stanley*, 147 N. Y. 560 (573); *Craver* v. *Jermain*, 17 Misc. 244. (As to the effect of a decree of foreclosure of a mortgage given by a trustee who was also remainderman, and who was sued individually, upon the beneficiaries, see *Rathbone* v. *Hooney*, 58 N. Y. 463, 467). The trust instrument may authorize a sale or mortgage if directed or approved by the court; but even in such a case, as well as where the authorization of the court is required by statute, the matter must be brought directly before the court for consideration, and directly passed on. The mere fact that in a suit involving the trustee's title, the trustee consents to discontinuance of the action and releases the other party from all demands, and thereupon the court dismisses the complaint, does not constitute an authorization by the court of the trustee's abandonment of his claim, in contravention of the trust. *Fitzgerald* v. *Topping*, 48 N. Y. 438 (444).

§ 182. **What may be sold or mortgaged.**—The statute (Real Prop. L., § 85) empowering the court to authorize a trustee to sell or mortgage the trust estate, applies only to the estate vested in the trustee. If, therefore, the trust is to receive and apply rents for a legal term, in which case the trustee is vested merely with an estate for that term, and is not vested with the fee, it is only the trust estate, and not the fee, which may be sold or mortgaged under the section above cited. If the remainder is vested in infants or other incompetent persons, whose interests require a sale or mortgage, proceedings to that end must be taken under the Code provisions (§§ 2348 *et seq.*) (or under a special act of the Legislature. *Ebling* v. *Dreyer*, 149 N. Y. 460). Compare *O'Donoghue* v. *Boies*, 92 Hun, 3. If the remainder is vested in adults, who are not incompetent, it cannot be sold or mortgaged at all without their consent. Even in the case of incompetent persons, the inherent power of the court, apart from statutory authority, to manage and control, is confined to personal property, and the income of realty. In so

far as *Matter of Morris*, 63 Hun, 619, aff'd 133 N. Y. 693, may conflict with these principles, it is erroneous. *Losey* v. *Stanley*, 147 N. Y. 560; *Brevoort* v. *Grace*, 53 N. Y. 245; *Matter of Field*, 131 N. Y. 184. So also the case of *Duffy* v. *Durant Land Improvement Co.*, 78 Hun, 314, evidently proceeds upon an erroneous theory. Compare *U. S. Trust Co.* v. *Roche*, 116 N. Y. 120. Quite distinct from the questions just discussed is the acknowledged power of the court to enforce and protect trusts or to establish and enforce rights of property between parties to a litigation. *Losey* v. *Stanley*, 147 N. Y. 560 (570–71); *Goebel* v. *Iffla*, 111 N. Y. 170. Even the legislature (except in cases of necessity, arising from the infancy, insanity, or other incompetency of those in whose behalf it acts) has no power to authorize, by special act, the sale of private property for other than public uses, without the consent of the owner. This principle applies where the property is held in trust. *Powers* v. *Bergen*, 6 N. Y. 358; *Russell* v. *Russell*, 36 N. Y. 581 (586). But in case of such a necessity it may do so, even though contingent future rights of unborn children be involved. *Leggett* v. *Hunter*, 19 N. Y. 445 (460), and cases cited.

§ 183. **Remedy in equity.**—And if an invalid transfer is attempted, the fact that the trustee is responsible for damages[1] does not deprive the beneficiary of his right to sue in equity for the cancellation of the deed. In order to oust the equitable remedy, the legal remedy must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Storm* v. *Bennett*, 91 Hun, 302. Such a transfer defeats the trust *pro tanto*, and equity may always be appealed to to prevent the destruction of the trust. *Id.*

§ 184. **Limited authority.**—A trustee has no general power of disposition of the trust estate, but must derive such power from the instrument creating the trust, or, in special circumstances, such power may be implied. But where there is a designation of the conditions upon which the trust estate is to be sold, if at all, the trustee is not authorized to convey any title ex-

[1] But see *ante*, § 29, note 1.

cept in the manner provided for in the trust instrument. Thus, if the trust instrument authorizes a sale upon the consent of the beneficiary, that consent is essential to the validity of a sale to a party with notice. *O'Connor* v. *Waldo*, 83 Hun, 489 ; *Suarez* v. *de Montigny*, 1 App. Div. 494 ; so if the consent of the grantor of any other person is required. *Kissam* v. *Dierkes*, 49 N. Y. 602. See *post*, § 622 *et seq.* ; § 641 *et seq.*

If a sale, conveyance, or other act of the trustee would be valid under certain circumstances, and otherwise would be in contravention of the trust, false recitals in an instrument attempting to effect it, stating that such circumstances do exist, are immaterial. It is the fact, and not the recital of it, that counts. *Briggs* v. *Davis*, 20 N. Y. 15 ; s. c. 21 N. Y. 574 ; *Scott* v. *Rand*, 115 Mass. 104 ; s. c. 118 Mass. 215.

§ 185. **Personal property.**—The trustee of personal property, with full power to manage and control it, may sell the same, even to a party with notice, and give good title. There is nothing in the terms of such a trust that renders a sale a contravention thereof ; nor is the purchaser in such case responsible for the due application by the trustee, of the proceeds of the sale. *Dillaye* v. *Com. Bank of Whitehall*, 51 N. Y. 345. The same result would be reached if the sale were in contravention of the trust, but the purchaser had no actual or constructive notice, and paid value. *Id.* Real Prop. L. § 88.

§ 186. **Unauthorized satisfaction piece.**—Where a mortgage is executed to one as trustee, in order, as there expressed, to secure payments to a beneficiary during a specified term, the mortgagee cannot during the term assent to a satisfaction of the mortgage, or execute a valid satisfaction piece, not even, it seems, for an adequate consideration. By its terms the mortgage is to be security not only for the payment of the money, but to remain such security for the payment of money at specified times during the specified term. The trustee has no power to vary its terms nor to receive payment in anticipation. In case of default the trustee might foreclose, under the express authority given in the mortgage, but such action would result in some form in the substitution of other security for the proceeds. *McPherson* v.

Rollins, 107 N. Y. 316; *Kirsch* v. *Tozier*, 143 N. Y. 390; compare *Luce* v. *Gray*, 92 Hun, 599; *Townsend* v. *Rackham*, 143 N. Y. 516; *Waterman* v. *Webster*, 108 N. Y. 157; *Bendheim* v. *Morrow*, 73 Hun, 90. See *ante*, pp. 14, 15, 50, 66, and *post*, § 380.

§ 187. **Unauthorized waiver.**—So the trustee has no authority to waive the estoppel of a former judgment, and thus prejudice the beneficiaries appearing and insisting on the estoppel. *Pray* v. *Hegeman*, 98 N. Y. 351 (362).

§ 188. **Unauthorized interference.**—A trustee has no authority as such to change or control the legal or equitable rights of the beneficiaries by his voluntary action (except as he may be given power by the trust instrument to increase or decrease shares, etc.). *Chester* v. *Jumel*, 125 N. Y. 237 (253).

§ 189. **When statute inapplicable.**—When, instead of being trust real estate, in the sense of being property devised or granted to the trustee by the trust instrument, or bought by him under authority to invest in realty as such, the real estate in question is otherwise acquired by the trustee, as, for example, by his foreclosure of a mortgage held in trust, or by his unauthorized investment of trust funds in land, here his title, and power to convey or mortgage, are unrestricted by the statutory provisions, and he may execute a valid mortgage or give a good title. *Leggett* v. *Hunter*, 19 N. Y. 445 (457–58); *Valentine* v. *Belden*, 20 Hun, 537; *McLean* v. *Ladd*, 66 Hun, 341; *Yonkers Savings Bank* v. *Kinsley*, 78 Hun, 186. And a title secured through foreclosure of such a mortgage is a good title. *McLean* v. *Ladd*, *supra*. If the act of the trustee in investing funds in lands is unauthorized, the beneficiary may of course hold him liable for breach of his duties. (*Id.*) As to following trust funds into property in which they have been improperly invested, see *post*, § 375. As to technical powers in trust conferred upon trustees, see *post*, Chap. XIII. *et seq.*

(5) *The Trustee's Duties.*

§ 190. **In general.**—The duties of the trustee flow from several sources. First, is the trust instrument, creating the particu-

lar trust, and defining its purposes. Next, are the statutes imposing certain duties on those who accept a trusteeship. And, finally, the general principles of the law cover the whole field of his obligations in connection with the given trust. It is the duty of the trustee to regulate his acts according to the legal provisions of the trust instrument. "The trustee must apply the trust fund according to the instructions of its author. . . . The relation of the donor and trustee, the power of the former and the duty of the latter, are precisely what they were by the common law." *Leggett* v. *Perkins*, 2 N. Y. 297 (307). He must obey orders of the court. *Dodge* v. *St. John*, 96 N. Y. 260 (263). It is his absolute and positive duty to defend the life of the trust whenever it is assailed, if the means of defence are known to him or can with diligence be discovered. *Cuthbert* v. *Chauvet*, 136 N. Y. 326 (332); *Geissler* v. *Werner*, 3 Dem. 200; *Matter of Hutchinson*, 84 Hun, 563. It is against his duty either to serve an offer of judgment declaring the trust void, or to allow judgment by default by failing to answer, or to waive the defence of the statute of limitations. *Spicer* v. *Raplee*, 4 App. Div. 471 (476); *Butler* v. *Johnson*, 111 N. Y. 204 (212). The statute enjoining any act on his part which will defeat the trust, embraces defaults and other omissions of duty as well as open and avowed acts of hostility. *Cuthbert* v. *Chauvet*, 136 N. Y. 326 (332).

In general, a voluntary trustee, acting not gratuitously, but for compensation, is bound to exercise that degree of diligence which persons of ordinary prudence are accustomed to use in their own affairs. This duty extends to all the interests committed to his charge; and his whole conduct in the management of the trust, when called in question, is to be considered in view of the powers which he may exercise in the protection, recovery, and application of the assets and the general management of the trust. He may be chargeable with a *devastavit* as well by reason of his neglect as his intentional omission or actual misappropriation or positive fraud. The law exacts not only good faith, but reasonable care and due diligence, and he is liable for any loss resulting from a breach of duty to those interested in the trust. *Matter of Cornell*, 110 N. Y. 351 (357). It is also the trustee's duty to retain the trust estate in his own name and under his

own control, and not turn it over to the beneficiaries, *Bramhall* v. *Ferris*, 14 N. Y. 41 (47), except, of course, in cases where the trust is created for the purpose of paying annuities, &c.

The trustee has no right to discharge a mortgage constituting part of the trust estate, unless it has in fact been paid, or, if given to secure not the payment of a lump sum, but of successive sums, *e. g.* an annuity, until the period for such payments has elapsed and the conditions have been complied with. And if a subsequent purchaser of the land, or a subsequent mortgagee, has actual or constructive notice of the true facts, such a mortgage, so improperly discharged, may be reinstated, at the suit of the beneficiaries. *Kirsch* v. *Tozier*, 143 N. Y. 390, aff'g 63 Hun, 607; *McPherson* v. *Rollins*, 107 N. Y. 316. See *ante*, § 186. And a recital in a recorded mortgage, that it is given as security for the payment of sums of money to a third party, during a specified term, not yet expired, is sufficient notice of a trust. (Cases cited *supra.*) And it seems that such a mortgage does not merely put a subsequent purchaser or mortgagee on inquiry as to whether or not it has been validly discharged, but that it is a security which cannot be discharged at all until the term of the payments secured by it has elapsed, and that the trustee has no power to accept a premature payment, or to vary the trust security, at all events when the beneficiaries are minors. *Kirsch* v. *Tozier*, *supra*, p. 396–97.

"An executor, administrator, receiver, assignee, or other trustee, may, for the benefit of creditors, or of others interested in real property held in trust, disaffirm, treat as void, and resist any act done or transfer or agreement made in fraud of the rights of any creditor, including himself, interested in such estate or property; and a person who fraudulently receives, takes, or in any manner interferes with the real property of a deceased person, or an insolvent corporation, association, partnership, or individual, is liable to such executor, administrator, receiver, or other trustee for the same, or the value thereof, and for all damages caused by such act to the trust estate. A creditor of a deceased insolvent debtor, having a claim or demand exceeding one hundred dollars against such deceased, may, for the benefit of creditors or others interested in the real property of such deceased, disaffirm, treat as void, and resist any act done or con-

veyance, transfer or agreement made by such deceased in fraud of the rights of any creditor, including himself, and may maintain an action to set aside such act, conveyance, transfer, or agreement, without having first obtained a judgment on such claim or demand ; but the same, if disputed, may be established on the trial. The judgment in such action may provide for the sale of the premises or property involved, when a conveyance or transfer thereof is set aside, and that the proceeds thereof be brought into court or paid into the proper surrogate's court to be administered according to law." Real Prop. L., § 232. See L. 1858, Ch. 314, as amended. *Southard* v. *Benner*, 72 N. Y. 424. Also Birdseye's R. S. (2d ed.), p. 1342 ; Bishop on Insolvent Debtors (3d ed.), 156 *et seq.*

§ 191. **Undue diligence.**—There is, however, such a thing as undue diligence. The very fact that the trustee is acting in a representative capacity, which lays on him the burden of standing by the trust and exhausting all proper means of protecting the beneficiaries, also requires that if the beneficiaries do not want a given form of protection, and are satisfied with a given status of affairs, and see in it their best interest, and if the subject is one where the law does not interfere with the exercise of their option, here the trustee, divested, in essence, of any true representative capacity, is not called upon to insist on his course in disregard of their views, and in such a case the court may even refuse to give him any standing in the matter. Thus, while it is the right and duty of trustees to have the will construed by the court, in case its meaning or the validity of its provisions is doubtful, yet where the question raised concerns conflicting rights of different persons, and they acquiesce in the decision of the Supreme Court, the trustees cannot be said to be "aggrieved," and so, an appeal by them only, to the Court of Appeals, will be dismissed because the appellants have no interest. *Bryant* v. *Thompson*, 128 N. Y. 426, with which compare *Bliss* v. *Fosdick*, 76 Hun, 508 (510), aff'd, 144 N. Y. 706. Under a similar principle, the trustee should not carry his loyalty to the trust so far as to antagonize the law. Thus, it is no part of his duty to attempt to benefit the estate by evading taxation. *Wheelwright* v. *Rhoades*, 28 Hun, 57 (58) ; *Valentine* v. *Valentine*, 3 Dem. 597.

§ 192. **Moral duty.**—Though a devise fails to charge the devisee with a legal trust, yet the terms of the will may be such as to impose on the devisee the moral duty of acting as if its injunctions were legally binding on him. *Follett* v. *Badeau*, 26 Hun, 253 (258).

Disinterestedness.

§ 193. **General principles.**—It is the duty of the trustee, or a donee of a trust power, in his dealings with the trust property, to look solely to the best interests of the beneficiary, and to refrain from seeking personal advantage. It is one of the great rules of law that all contracts made by a trustee, or fiduciary, in which he is personally interested, are invalid at the election of the party he represents. The value of the rule lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of the trustee, by vitiating, without attempt at discrimination, all transactions in which he assumes the dual character of principal and representative. The intrinsic fairness of the given transaction is immaterial. *Munson* v. *S., G. & C. R. R. Co.*, 103 N. Y. 58 (73 *et seq.*); *Davoue* v. *Fanning*, 2 Johns. Ch. 252. He must not, either directly or indirectly, buy trust property for himself, *Tiffany* v. *Clark*, 58 N. Y. 632; *Terwilliger* v. *Brown*, 44 N. Y. 237, and cas. cit.; *Forbes* v. *Halsey*, 26 N. Y. 53 (65); *Case* v. *Carroll*, 35 N. Y. 385; *Jewett* v. *Miller*, 10 N. Y. 402; *Chapin* v. *Weed*, Clarke Ch. 464; *Slade* v. *Van Vechten*, 11 Pai. 21; *Campbell* v. *Johnston*, 1 Sandf. Ch. 148; *Reynolds* v. *Sisson*, 78 Hun, 595; *Quackenbush* v. *Leonard*, 9 Pai. 334; compare *De Bevoise* v. *Sandford*, Hoff. Ch. 192 (*Wildey* v. *Robinson*, 85 Hun, 362, takes a less pronounced view, p. 365); not even where, while holding an equity of redemption as trustee, he is individually the owner of the mortgage; on foreclosure, he may not buy in the equity for himself. *Hubbell* v. *Medbury*, 53 N. Y. 98; nor may he reap any personal benefit from a sale which he could and should have prevented in the interest of the estate. *Lytle* v. *Beveridge*, 58 N. Y. 592 (606); compare *Matter of Bolton*, 71 Hun, 32; nor trade and bargain, in his own interest, with the bene-

ficiary. *Post* v. *Benchley*, 48 Hun, 83 (89); as to this, see *Geyer* v. *Snyder*, 140 N. Y. 394; *Davoue* v. *Fanning*, 2 Johns. Ch. 252 (266–67); *Matter of Randall*, 80 N. Y. 229. If the trust is one under which the beneficiary's interest is assignable, and he is an adult and stands on an even footing with the trustee, it is said in *Matter of Ledrich*, 68 Hun, 396, that he may settle with the trustee, and assign his interest to the latter. In this case, however, he had evidently ratified the transaction by acquiescence. The same principles apply not only in case of valid trusts, but also on settlements and accountings with trustees under trusts adjudged void. *Colburn* v. *Morton*, 1 Abb. Ct. App. Dec. 378 (385), citing numerous authorities on the general subject.[1]

§ 194. **Voidable, not void.**—A personal purchase by the trustee is not, however, void, but merely voidable at the election of the beneficiary. *Dodge* v. *Stevens*, 94 N. Y. 209 (215); *Harrington* v. *Erie Co. Savings Bank*, 101 N. Y. 257 (264); *Boerum* v. *Schenck*, 41 N. Y. 182, and note, p. 200; *Forbes* v. *Halsey*, 26 N. Y. 53 (65); *Bostwick* v. *Atkins*, 3 N. Y. 53. And laches may bar the right to object, *Geyer* v. *Snyder*, 140 N. Y. 394 (402); *Kahn* v. *Chapin*, 84 Hun, 541; *Harrington* v. *Erie County Savings Bank*, 101 N. Y. 257. Other cases illustrating the general principle are: *Paff* v. *Kinney*, 1 Bradf. 1; *Ames* v. *Downing*, 1 Bradf. 321; *Zilkin* v. *Carhart*, 3 Bradf. 376; *Oliver* v. *Frisbie*, 3 Dem. 22; *Matter of Bach*, 2 Con. 490; *Barker* v. *Smith*, 1 Dem. 290; rebate on purchases, *Kedian* v. *Hoyt*, 33 Hun, 145; sale by trustee individually to infant beneficiary, *Hyland* v. *Baxter*, 42 Hun, 9 (16); buying in tax title, *Gilman* v. *Healy*, 49 Hun, 274. Nor can the trustee purchase for his own benefit property which, although not the subject of the trust, is connected with it in this, that a sale thereof, for less than its value, will diminish the trust fund —*e.g.*, where testator bequeaths his personal property in trust, and also, aside from the trust, leaves real estate encumbered by a mortgage securing his bond; and the trustees, at a foreclosure

[1] As to the method by which a trustee, if authorized, may effect a conveyance to himself, of trust property, see 2 Perry on Trusts, § 602 *w*.

sale, personally buy in the land at less than its full value, and thus a deficiency judgment results, payable out of the personal estate held in trust. *Fulton* v. *Whitney*, 66 N. Y. 548. So where the trustee of a junior mortgage buys in the property personally, on a sale under the prior mortgage, at a figure insufficient to produce funds sufficient to cover the mortgage he holds in trust. The duty to make the sale produce as much as possible, and the personal interest to buy at the lowest figure, are inconsistent. *Van Epps* v. *Van Epps*, 9 Pai. Ch. 237 (241). It does not follow that the trustee loses the amount of his bid; in the Van Epps case he was allowed to hold the property as security for that amount only, unless he should elect fully to indemnify the trust estate by paying the whole amount of the principal and interest due upon the bond and mortgage which he held in trust (p. 242); in *Fulton* v. *Whitney*, *supra*, it was found as a fact that the actual value of the property was greater than the price paid, and that the excess would more than satisfy the mortgage and indemnify the trust estate. The court found the trustees chargeable with the difference between what they paid on the purchase and the actual value, with interest. (On this point of the extent of the trustee's liability, and the method to be adopted to protect all rights, all the cases cited on the general obligation of the trustee to refrain from dealing personally with the trust estate may be consulted; also *People* v. *Norton*, 9 N. Y. 176, 180 *et seq.*, and a note, 41 N. Y. p. 201.) So also, where a judgment creditor executes a declaration that he holds the judgment in trust for the joint benefit of himself and another, he cannot, on execution sale thereunder of the debtor's property, buy it in for his own benefit, and if he does so is liable to the beneficiary for the *pro rata* share of its real value after subtracting the amount actually paid. *Woodruff* v. *Boyden*, 3 Abb. N. C. 29.

If, however, the sale of property outside the trust can have no bearing on the trust, the relation of the trustee to his beneficiaries constitutes no reason why he should not buy in personally property in which the beneficiaries as such have no interest, even though it form part of the same estate of another part of which he is the trustee. See *Hollingsworth* v. *Spaulding*, 54 N. Y. 636; *Matter of Monroe*, 142 N. Y. 484 (490). And

if a trustee has also a personal interest in property affected by the trust—*e.g.*, where he is individually a joint owner, while it is true that this fact alone does not entitle him to buy in the property at a sale, yet if he applies to the court for leave to bid, and cites in all parties interested, the decree in his favor will enable him to acquire a good title. *Scholle* v. *Scholle*, 101 N. Y. 167. But the formal leave to buy, which is usually granted to parties in a foreclosure or partition sale, and inserted in the judgment, does not suffice to enable the trustee to buy for himself. *Id.* (172 and cas. cit.). So it has been held that a trustee may buy in personally, claims held by third persons against those who are beneficiaries of the trust, *Clark* v. *Flint & P. M. R. Co.*, 5 Hun, 556 ; but whether he may enforce them for more than the amount actually paid by him, *quaere*. *Id.*

An agreement between trustee and beneficiary that the former shall receive extra compensation for the performance of his regular duties is void for want of consideration. *Wildey* v *Robinson*, 85 Hun, 362. It would seem that if a person named as trustee does not assume the office, and duly renounces, there is no objection to his doing acts for his own benefit, which, had he been trustee, would have been voidable. (See *Valentine* v. *Duryea*, 37 Hun, 427.)

§ 195. **Infant beneficiary.**—Where the beneficiaries are infants, or otherwise incompetent to protect and watch over their own interests as against the trustee, he is held to even stricter accountability than under the general rules. *Howell* v. *Mills*, 53 N. Y. 322.

Impartiality.

§ 196. **General principles.**—It is a general, if not invariable, feature of express trusts, that conflicting interests are to a greater or less extent confided to the care of the trustee. And as between such conflicting interests he is invariably and strictly required to act fairly and impartially. The conflict may exist between the beneficiaries on the one side, and on the other the creator of the trust who retains the reversion, or his heirs or next of kin ; or between the several beneficiaries ; or between beneficiaries and remaindermen, and no doubt may arise in many

other forms. The duty of the trustee in such cases is illustrated and discussed in various parts of this book, under the heads of Investments, Application of Rents, Removal of Trustee, Execution of Powers, etc. In general, it may be laid down in sweeping terms that as between various interests existing under the trust scheme, and entitled to depend on him for protection, he must not "take sides;" in determining on any given course which may result to the benefit of one class and the detriment of another, he must be guided by the simple purpose of doing justice (*Matter of Luckey*, 4 Redf. 95); if his determination is to be based on the existence or non-existence of given facts, he must not wilfully disregard the facts, or omit reasonable efforts to ascertain them.

§ 197.—To a large degree the creator of the trust may confer discretion upon the trustees, but an uncontrolled and arbitrary discretion is not favored by the courts, and will not be presumed, *Crooke* v. *County of Kings*, 97 N. Y. 421 (443–44); and even where it exists, it can never be broad enough to warrant capricious, wanton, groundless, or dishonest conduct on the part of the trustee. See *post*, Chap. XVII. Thus, a trustee must not act as attorney for one beneficiary, as against another, at any rate in matters affecting the trust, nor for any other person whose interests placed in his charge are hostile to those of the trust. Such a course constitutes ground for his removal. *Matter of Cohn*, 78 N. Y. 248. And it also invalidates the relation of attorney and client thus attempted, in so far as it might be set up to the disadvantage of the beneficiaries—*e.g.*, in a controversy over the matters involved, the trustee when called on to produce letters received from his client, or testify to communications, cannot, nor can the client, set up the professional privilege as against the beneficiaries. *Pritchard* v. *Foulkes*, C. P. Cooper's Chan. Rep. 1837–38, p. 14; *Tugwell* v. *Hooper*, 10 Beav. 348; Kerr on Discovery, 125. The trustee must not allow himself to occupy any position conflicting with his duties to the trust. *Putney* v. *Fletcher*, 148 Mass. 247; *Perkins* v. *Finnegan*, 105 Mass. 501; *Gray* v. *Parke*, 155 Mass. 433; *Drake* v. *Green*, 10 All. 124. He must not capriciously delay a sale directed. *Fincke* v. *Fincke*, 53 N. Y. 528 (535). Nor

postpone or accelerate it for the purpose of compromising the respective rights of either trust beneficiaries or remaindermen. *Heermans* v. *Robertson*, 64 N. Y. 332 (339). The terms of the trust may impose upon him the duty of paying special attention, or giving precedence, to certain interests over others. But in so far as different interests exist, and in so far as they do extend, it is his duty to bear in mind that he occupies his position not for his own benefit, but for that of others ; not to contravene the purposes of the trust, but to effectuate them ; not to do injustice to any, but to do justice to all.[1]

§ 198. **As between beneficiary and remainderman.**—The trustee, in selecting securities for investment, making authorized outlays, deciding when and how to sell trust property, and doing other acts which may involve an increase in income, at the expense of the remainderman, or *vice versa*, must act fairly as between the two, and give no unjust advantage to either. But in so far as the nature of his duties or the terms of the trust instrument vest him with discretion, the court will not interfere, so long as he is acting in good faith and without intent to injure either of the parties interested for the benefit of the other. *Hancox* v. *Wall*, 28 Hun, 214 (see *Hancox* v. *Meeker*, 95 N. Y. 528) ; *Knight* v. *Lidford*, 3 Dem. 88 (93) ; *Heermans* v. *Robertson*, 64 N. Y. 332 (339) ; 2 Perry on Trusts, § 539. And the trust instrument may make it the duty of the trustee to seek the interest of the beneficiary at the expense of the remainderman. Thus, testator may direct the trustee to apply to the use of the beneficiary not only all the income, but any part, and if need be all, of the principal. *Matter of Blanck*, 5 Dem. 301. Where testator gives property to a trustee with an absolute trust for conversion, and with a discretion as to the time at which the conversion shall take place, if from any cause whatever, arising from the discretion and judgment of the trustee, the conversion is delayed, then, as between life tenant and remainderman, the former is not to be prejudiced by this delay, but is to have the

[1] A remainderman, even though his interest is small, is entitled to full information as to what the trustee is doing in matters that may affect him. *In re Dartnall* (1895), 1 Ch. 474. And so is the beneficiary. *In re Tillott* (1892), 1 Ch. 86.

same benefit as if the conversion had taken place within a reasonable time from the death of the testator, which is usually fixed at twelve months from that period. *Rodman* v. *Fincke*, 68 N. Y. 239 (244).

It is said that if the grantee of a power is authorized to defer a sale, and does so for the special benefit of the beneficiary of the trust, in spite of contemplated depreciation of the corpus, a sinking fund should be reserved from the rents to cover the depreciation. *Matter of Housman*, 4 Dem. 404. But it is believed that such cases must be decided largely on their own facts, and in connection with a proper application of the principle calling for a due regard to the fair interests of all concerned, as they may appear. *Heermans* v. *Robertson*, 64 N. Y. 332 (339).

Investments.

§ 199. **General principles.**—There is no statute prescribing the securities in which a trustee must invest his funds.[1] The matter is controlled by the principles laid down in the leading case of *King* v. *Talbot*, 40 N. Y. 76.[2] The doctrine of that case may be summarized as follows: In England, trustees were bound to invest in the public debt, or in loans secured by the pledge of real estate. This rule was not a part of the common law, applicable to this State as a colony, and is binding on our courts only so far as it rests on the fundamental principles of equity. The underlying principle in the administration of trusts is the duty of the trustee to be faithful, diligent and prudent. He must act with such diligence and prudence, in the management of the trust, as, in general, prudent men of discretion and intelligence *in such matters*, employ in their own *like* affairs. "This necessarily excludes *all speculation*, all investments for an *uncertain and doubtful rise in the market*, and, of course, everything that does not take into view the nature and object of the trust, and the consequences of a mistake in the selection of the investment to be made." The fact that the trust instrument entrusts to the *discretion* of the trustee the investment of the estate,

[1] Except where the trustee is a trust company, as to which see the Banking Law, Art. IV.; Birdseye, R. S., 2d ed., p. 230.

[2] See also *Ackerman* v. *Emott*, 4 Barb. R. 626.

in no way affects the trustee's duty or responsibility. This was the case of a trust for infants, providing that the estate should be placed at "interest" for their maintenance. The first requisite, therefore, was *security;* the second, interest; and the third, the retention of power to recall the fund for delivery to the infants at majority. Therefore, no investment would be proper which involved hazard, or which contemplated by its terms that the principal was not to be returned at all. "The moment the fund is invested in *bank*, or *insurance*, or *railroad stock*, it has left the control of the trustees," "and the terms of the investment do not contemplate that it ever will be returned to the trustees." "The trustees shall not place the fund where its safety and due return to their hands will depend upon the success of the business in which it is adventured, or the skill and honesty of other parties entrusted with its conduct; and it is in the selection of the securities for its safety and actual return, that there is scope for discretion and prudence. . . ."

The opinion in the foregoing case was read by Woodruff, J. All the judges concurred in the result. Murray, Grover, Daniels, and James, JJ., stated that they "thought it a settled principle of law in this State, that a trustee, holding trust funds, for investment for the benefit of minor children, must invest in Government or real estate securities, and that any other investment would be a breach of duty, and the trustee would be personally liable for any loss." To this formulation of the rule, Hunt, Ch. J., Mason and Lott, JJ., are given as *contra.* Brief discussion of the general rule is found also in a few early cases, now to be cited, as well as in later ones to be considered hereafter. In 1820, Chancellor Kent, in his opinion in *Smith* v. *Smith*, 4 Johns. Ch. 281 (284), says: "I have no doubt that is a wise and excellent general rule, that a trustee loaning money, must require adequate real security, or resort to the public funds. . . . Possibly, there may be cases in which the taking of personal security would exonerate the trustee, if that security was selected with discretion, and according to the practice of the testator, in like cases. . . . I am not, however, prepared to say whether any, and if any, what exceptions, may exist to the general rule on this point." In 1829, in *Haggerty* v. *Duane*, 1 Pai. Ch. 321 (323), Chancellor Walworth, in directing a fund, the ownership

of which was in dispute, to be paid into court, also directed the assistant register to put it out at interest on bond and mortgage, or invest it in the public stock. In 1848, in *Bogart* v. *Van Velsor*, 4 Edw. Ch. 718 (722), the court say: "As a general rule, executors and trustees are not warranted in lending money of the estate on mere personal security, . . . because other and better, as Government stocks, and mortgages of real estate, are accessible to them as a means of safe investment."

A trustee's duty in regard to investments is continuous. It is not enough to discharge him from liability that the investment was safe when made. The value or security of mortgaged premises, for example, may decline, and if payment of interest is delayed, the trustee is put on notice and must act promptly. *Matter of Butler*, 1 Con. 58. *Matter of Stark*, 15 N. Y. Supp. 729. But if there is a sudden and unexpected decline, owing, for example, to a general financial panic, the trustee would not be liable for the loss. *Matter of Blauvelt*, 2 Con. 458 (470). If the trustee makes proper investments, and is not guilty of negligence in their retention, he is not personally liable for subsequent depreciation. *Crabb* v. *Young*, 92 N. Y. 56 (68); *Stuart* v. *Spaulding*, 30 Hun, 21 (28).

§ 200. **Propriety of, may be res adjudicata.**—A decree passing on and approving the accounts of trustees, including given investments, will, while it stands, estop the parties to that proceeding from raising the same question. *Matter of Denton* v. *Sanford*, 103 N. Y. 607 (613, 614); *Bushnell* v. *Drinker*, 5 Redf. 581. Of course subsequent events may lay a basis for a new question as to the propriety of continuing those investments.

§ 201. **Mortgage on land.**—Even though the trust instrument in terms confine the trustees to investment in mortgages on "unincumbered" real estate, unpaid taxes on the land are not an incumbrance within the sense of that provision. *Crabb* v. *Young*, 92 N. Y. 56 (69). "In lending money even on mortgage of real estate, a degree of care is necessary, which, if omitted, will render executors or trustees personally liable. They are bound to use ordinary care to ascertain that the title of the mortgage is valid, and that the value of the property at the time

of the loan is such as will, in all probability, be an adequate security for the repayment, with the interest, whenever the money shall be called in." The proper rule is "not to lend more than from one half to two thirds of the value of the property mortgaged." *Bogart* v. *Van Velsor*, 4 Edw. Ch. 718 (722). The land, a mortgage on which may properly be taken as security, must, as a general rule, be land in New York State. "Investments beyond the jurisdiction of the court should not be sustained unless in very rare and exceptional cases, and under very unusual and peculiar circumstances." Such an investment "will not be upheld by us as a general rule, and never unless in the presence of a clear and strong necessity, or a very pressing emergency." "We do not hesitate, therefore, to recognize and declare as the general rule that the trustee who invests beyond the jurisdiction does so at the peril of being held responsible for the safety of the investment." *Ormiston* v. *Olcott*, 84 N. Y. 339 (343, 344); *Matter of Denton* v. *Sanford*, 103 N. Y. 607 (612); *Matter of O'Hara*, 62 Hun, 531; *Cocks* v. *Barlow*, 5 Redf. 406.

"But this rule relates only to *voluntary* investments by the trustee, having the fund in his hands and full opportunity and freedom of choice, and does not govern a case where, by the act of the testator, a foreign investment has been made; nor a case where, without the fault of the executor, the assets have been transmuted into a debt which can only be secured and saved by taking a foreign security. *Ormiston* v. *Olcott*, 84 N. Y. 339 (344). Nor a case where, on proper sale by the trustee of land lying without the State, he is obliged to accept part payment in the shape of a purchase money mortgage on the same land. *Matter of Denton* v. *Sanford*, 103 N. Y. 607 (613). And if the testator direct an investment in land, out of New York State, the court may, with the consent of all parties having either vested or contingent interests, authorize the purchase of land in another place; and the court may assent to such a change, or any change, of securities on behalf of infants within its jurisdiction. *Wood* v. *Wood*, 5 Pai. 596 (600).

And even in trusts such that the trustee must hold the corpus invested, and not pay it over to the beneficiary, he may invest it by loaning it to the beneficiary on the security of a bond and

mortgage on real estate. In such a case the beneficiary, as mortgagor, figures as a mere third party, like any mortgagor. *Judge* v. *O'Connor*, 70 Hun, 384; *Baldwin* v. *Isham*, 25 Hun, 560. So he may, it has been held, loan it to one vested with the remainder after the trust, on a mortgage thereof. *Delafield* v. *Schuchardt*, 2 Dem. 435. But such a mortgage would appear, in general, to be a highly unsatisfactory security.

§ 202. **Second and third mortgages.**—Trustees are generally not justified in loaning on the security of a second or third mortgage. *Lacey* v. *Davis*, 4 Redf. 402 (408); *King* v. *Mackellar*, 109 N. Y. 215 (221); *Whitney* v. *Martine*, 88 N. Y. 535 (540); *Matter of Havemeyer*, 3 App. Div. 519 (524). Such an investment may in certain cases be proper, but is not favored. *Matter of Blauvelt*, 2 Con. 458 (470). *Savage* v. *Gould*, 60 How. Pr. 234; *Matter of Petrie*, 5 Dem. 352.

§ 203. **Government securities—Meaning.**—In *King* v. *Talbot*, 40 N. Y. 76, Woodruff, J., says (p. 84), that in that particular case he does not deem it necessary to determine whether the English rule of investment referred to *ante*, § 199, should, by precise analogy, be deemed to prohibit here investments in any other public debt than that of the State of New York. In *Matter of Macdonald*, 4 Redf. 321, it appears that the surrogate had previously directed executors to invest funds in United States government registered bonds. Surrogate Ransom incidentally approved of United States bonds in *Matter of Keteltas*, 1 Con. 468 (471), but only on the supposed authority of *King* v. *Talbot*, *supra*. Many cases illustrating such investments are found *post*, § 419, and there is, of course, no doubt whatever that by a long settled and general practice, often in evidence before the courts without eliciting any disapproval, United States bonds have gained recognition as a proper form of investment, if, indeed, as seems highly doubtful, there ever was any sound reason for thinking them outside the scope of the rule. See also *Craig* v. *Craig*, 3 Barb. Ch. 76 (100). By L. 1889, ch. 65, it is provided that "it shall be lawful for executors, administrators, guardians and trustees and others holding trust funds for investment to invest the funds so held by them in trust in bonds or

stocks of any of the cities of this State issued pursuant to the authority of any law of this State."

§ 204. **Purchase of land** is not an authorized form of investment of trust funds. See *Doud* v. *Holmes*, 63 N. Y. 635. But it may be authorized by the trust instrument. See *Wood* v. *Wood*, 5 Pai. 596. And where land subject to a mortgage, and also personal property, are given to the trustee upon the same trust, the personal property might perhaps, in certain cases, be invested in the land by paying off the mortgage. *Hepburn* v. *Hepburn*, 2 Bradf. 74. Where a trustee improperly invests in land, he nevertheless acquires a legal title, and is the only necessary party defendant to an action to foreclose a mortgage on the land, which he assumed. The purchaser at the foreclosure sale gets a good title. The persons entitled to the money which was used by the trustee in making the purchase have, as against him, a right to have the property adjudged to be theirs, or they may require the trustee to account for the money thus misapplied. They cannot have both remedies. *McLean* v. *Ladd*, 66 Hun, 341. And as the property did not belong to the testator, as land, the absence of a power, under the will, to execute mortgages, does not negative the trustee's power to mortgage such land. *Id.* It is not proper for a trustee to use trust funds in building a house on land held in trust. *Rose* v. *Rose*, 6 Dem. 26. Compare *Stevens* v. *Stevens*, 80 Hun, 514. And where the trust estate consists of land granted or devised to the trustee by the trust instrument, he is, of course, required to retain it, in the absence of any power conferred on him to sell it.

§ 205. **Corporation stock.**—Stock of private corporations, whether for railroad, mercantile, banking, manufacturing, mining, or other purposes, is not an allowable security for the investment of trust funds. *King* v. *Talbot*, 40 N. Y. 76; *Adair* v. *Brimmer*, 74 N. Y. 539; *Lacey* v. *Davis*, 4 Redf. 402. Sec. 54 of the Stock Corporation Law provides that "no person holding stock in any corporation as . . . trustee, unless he shall have voluntarily invested the trust funds in such stock, shall be personally subject to liability as a stockholder; . . . and the estates and funds in the hands of such . . . trustees shall be

liable in the like manner and to the same extent as the testator . . . or person interested in such trust fund would have been, if he had been living and competent to act and held the same stock in his own name, unless it appears that such . . . trustee voluntarily invested the trust funds in such stocks, in which case he shall be personally liable as a stockholder." *Diven* v. *Lee*, 36 N. Y. 302. As to the scope of this section, examine its context. Mr. Birdseye (R. S., 2d ed., p. 198 and 231) calls attention to the omission from § 52 and § 162 of the Banking Law, of former provisions relating to liability of a trustee as a holder of bank or trust company stock, and doubts whether the case is covered by the section above quoted. See also § 42 of the Insurance Law.

§ 206. **Corporation bonds.**—"It is not necessary for the decision of this case, and I am not prepared to say, that an investment in the bonds of a railroad, or other corporation, the payment whereof is secured by a mortgage upon real estate, is not suitable and proper, under any circumstances. If the real estate is ample to ensure the payment of the bonds, I do not, at present, perceive that it is necessarily to be regarded as inferior to the bond of an individual, secured by mortgage." Opinion of Woodruff, J., *King* v. *Talbot*, 40 N. Y. 76 (90). Compare *Matter of Havemeyer*, 3 App. Div. 519 (523). In *Judd* v. *Warner*, 2 Dem. 104, it was held that bonds secured by a mortgage on a railroad were not an authorized form of investment. Also *Matter of Keteltas*, 1 Con. 468. In any event bonds of a mining company, nominally secured by a mortgage on land of the most speculative value, requiring a large outlay to make it available, and capable of use only in carrying on a business of a hazardous and uncertain nature, are not an allowable form of investment. *Adair* v. *Brimmer*, 74 N. Y. 539 (551). As to bonds of a city railroad, see *Matter of Macdonald*, 4 Redf. 321; of a horse railroad, see *Judd* v. *Warner*, 2 Dem. 104.

§ 207. **Investment in trade.**—The employment of trust funds by the trustee in trade, or as loans to persons engaged in such business, or in the prosecution of mercantile, commercial, or manufacturing enterprises, or speculative adventures, has been uniformily condemned as illegal and as constituting a *devastavit*.

Deobold v. *Oppermann*, 111 N. Y. 531 (538); *Matter of Cozzens*, 2 Con. 622. So with investment in the business of stockbrokers; or in call loans. *Matter of Myers*, 131 N. Y. 409. Or in speculative or illegal transactions. *Fellows* v. *Longyor*, 91 N. Y. 324 (328).

§ 208. **Personal security.**—A trustee may not invest moneys of the estate on mere personal securities, as promissory notes, even though the maker is the owner of valuable realty and considered perfectly responsible. *Lefever* v. *Hasbrouck*, 2 Dem. 567; *Boyart* v. *Van Velsor*, 4 Edw. Ch. 718; *Matter of Foster*, 15 Hun, 387; *Lacey* v. *Davis*, 4 Redf. 402; *Matter of Cant*, 5 Dem. 269; *Matter of Keteltas*, 1 Con. 468; *Matter of Blauvelt*, 2 Con. 458 (468); *Hosack* v. *Rogers*, 9 Pai. 461 (468); *Halstead* v. *Hyman*, 3 Redf. 426 (429); *Matter of Vandevort*, 8 App. Div. 345.

§ 209. **Investment for trustee's benefit.**—Any employment of trust funds for the individual benefit of a trustee (as, their deposit with sureties on the trustee's bond, to secure the sureties) is forbidden by the rules of equity, and constitutes a *devastavit*, authorizing the removal of the trustee, and the reclamation of such funds from any one receiving them with notice. *Deobold* v. *Oppermann*, 111 N. Y. 531 (538). To this same class belong cases where trustees, having first made unauthorized investments, make others in the hope of protecting and bolstering up the first, and thus relieving themselves from liability. *Adair* v. *Brimmer*, 74 N. Y. 539 (552, 553); *Lacey* v. *Davis*, 4 Redf. 402 (405 and 408).

§ 210. **Continuing existing investment.**—The general rule is, that "except upon emergency, to protect the fund from depreciation, or to convert wasting securities to those of a permanent character, or investments in securities not authorized by law into such as are allowed, trustees may not sell or vary specific securities given in trust, nor securities left by a testator, in which he has himself invested the funds." 1 Perry on Trusts, § 466; *Toronto G. T. Co.* v. *C. B. & Q. R. R. Co.*, 64 Hun, 1 (8), aff'd 138 N. Y. 657. But it is "a settled principle that trustees

are not justified, in the absence of express or implied directions in the will, in continuing an investment permanently, made by the testator, which they would not be justified themselves in making." 1 Perry on Trusts, § 465. The rule does not relieve trustees from converting wasting securities into those of a permanent character, and converting investments, which are not authorized by law, into such as are authorized by law. Where a trustee receives securities not authorized, as shares of railroad stock, and the instrument creating the trust neither empowers, nor forbids, a sale, he has the *right* to sell the same, for the purpose of reinvesting the proceeds in such securities as he is authorized by law to invest in. *Toronto G. T. Co.* v. *C. B. & Q. R. R. Co.*, 64 Hun, 1 (9, 10), aff'd 138 N. Y. 657. "Whether it is the absolute *duty* of the trustee in such case to sell the securities, and whether, in case he does not sell them and loss ensues, he can be held liable for such loss, it is not now necessary to decide." *Id.*, p. 10. See *McRae* v. *McRae*, 3 Bradf. 199 (206). But it would appear to be his clear duty to do so if there were reasonable grounds for anticipating or fearing depreciation. In cases where a trustee is by the trust instrument authorized to sell securities, and the question is as to the best time to sell, and the securities received by him are of an unauthorized character, and it is difficult to decide whether it is wiser to sell at once or to hold for a time, the trustee is justified in relying on a memorandum of advice left by testator, to the effect that these securities are to be "held firmly." *Matter of Weston*, 91 N. Y. 502 (508). And if the trust instrument authorizes him to sell securities, and those he receives are of an unauthorized character—as bank or insurance stock—then it is his *duty*, and he is required, to convert them into securities authorized by law. *Gillespie* v. *Brooks*, 2 Redf. 349 (360). But in such a case he will not be held liable for loss resulting from failure to reinvest, unless he has acted negligently or in bad faith. *Matter of Porter*, 5 Misc. 274; *Matter of Wolfe*, 1 Con. 102.

And even though a will in terms directs the trustees not to sell securities, yet its other provisions, as, for example, a direction to divide the estate into portions, and at designated periods to pay over respective shares, may render it essential to sell securities in order to comply with all the provisions of the will

when read together. *Meeker* v. *Crawford*, 5 Redf. 450 (464). And if a life estate in certain land is given to one, beneficially, and all the rest, residue and remainder of the real and personal property to trustees, to divide, invest, etc.; here, though the remainder after the life estate is thus included in the trust, it does not necessarily follow that that remainder must be sold and the proceeds invested. *House* v. *Raymond*, 3 Hun, 44 (50). If a retiring trustee has been charged with certain securities as "cash," and a successor charges himself with the same, as "cash," he becomes responsible for the form of investment as if he had made it himself. *Matter of Hathaway*, 80 Hun, 186.

§ 211. **Rules varied by trust instrument.**—The creator of a trust may designate how investments may be made, and what security may be taken, and may even dispense with all security. *Denike* v. *Harris*, 84 N. Y. 89. Or he may direct to what extent real estate security must exceed in value amounts loaned on it, *Ferris* v. *Ferris*, 2 Dem. 336, where it was held that the direction "real estate to exceed in value by 50 per cent the amount loaned thereon," authorized a loan up to 66⅔ per cent of the value of the land. Or he may give discretion to the trustees in the selection of securities, but this will not absolve them from the usual requirements, unless set forth in unmistakable language. *King* v. *Talbot*, 40 N. Y. 76; *Matter of Cant*, 5 Dem. 269; *Matter of Keteltas*, 1 Con. 468. A direction in a trust instrument to invest "in New York mortgages, *or* State stocks, *or* United States stocks," does not indicate an order of preference which should be followed by the trustee. It indicates the various classes of securities among which he should select those that will give the best results. *Valentine* v. *Valentine*, 3 Dem. 597. Discretion conferred upon a trustee as to form of investment, does not warrant a corrupt selection of securities. If a bribe is accepted, to select certain securities, the trustee must not only make good the fund, but must account, it has been held, for the amount of the bribe. *In re Smith* (1896), 1 Ch. 71.

§ 212. **Mingling with other funds.**—A trustee may not mingle trust funds with his own money, and invest them in common, and require the beneficiary to accept an undivided interest

in the investment. *Doud* v. *Holmes*, 63 N. Y. 635. But a trustee may properly consolidate distinct trust funds, held for different beneficiaries, in a given investment, for the mutual benefit, and though the security is nominally taken by him as trustee for one estate, it is competent for him to make a declaration of trust in favor of the other beneficiary whose funds are also included in it. *Barry* v. *Lambert*, 98 N. Y. 300. Thus, an executor holding $6,000 in trust, added to it $1,800 given to him for investment by A, a stranger to the trust, and $200 of his own money, and with the total procured a mortgage to himself as executor for $8,000. The facts being shown, A's rights in the mortgage and its proceeds were protected, and the executor held as a trustee for A as to the $1,800. *Barry* v. *Lambert*, 98 N. Y. 300. So an individual seeking an investment of his own funds, and also holding $380 of another person's money for investment, combined the two funds and invested them in one mortgage taken to himself individually, and, the facts appearing, was held as a trustee, to the extent of the $380. *Matter of Frazer*, 92 N. Y. 239 (248).

§ 213. **Investment of separate portions.**—It is sometimes essential to the validity of a trust, to provide that the estate shall be divided, at least theoretically, into distinct shares or subshares. Thus, where the estate is to be held in trust for one life, and thereafter for several beneficiaries, in each case for life, it is essential to direct the division of the estate, at the end of the first life, into as many distinct shares as there are lives to measure the trusts, so that each given portion of the estate shall be held in trust for no more than two lives in all. No direction for physical division is required ; all that is requisite is that the intent to have the estate contemplated as theoretically divided into separate parcels or portions should appear. (Chaplin on Suspension of the Power of Alienation, sec. 179 *et seq.*) Sometimes, in cases where the terms of the trust are not such as to render such a direction essential, the trust instrument does nevertheless direct the division of the estate into separate parts. In still other cases, though the trust instrument is silent on the subject of division, the trustees do in fact effect a division, and allot certain property to the account of each beneficiary. In connection

with division of trust property in these various cases, the following principles have been established.

§ 214. **If no direction to separate.**—If one creates a testamentary trust in a part of his property (*e.g.*, $25,000), the executors-trustees have no right, in the absence of formal consent by adult beneficiaries, to set apart specific securities to constitute the trust fund, and release the remainder of the estate from liability to make good any depreciation or loss of earning capacity in the fund thus reserved. But consent by an adult beneficiary would bind him. *Leitch* v. *Wells*, 48 N. Y. 585 (599); *Wood* v. *Wood*, 5 Pai. Ch. 596. In the former case, the securities which the trustees attempted to set apart were bank stock, which was *per se* an illegal form of investment. This fact figures to some extent in the statement of the decision (pp. 606, 607), but the case appears to be an authority for the general proposition even in the absence of this feature. Such is the ruling in *Arthur* v. *Nelson*, 1 Dem. 337, where testator gave a large part of his estate to trustees, to hold in equal one eighth parts, in trust for separate beneficiaries. It was held that they could not bind the beneficiaries by an appropriation of certain existing securities to the respective eighths. As to a separation at request of the beneficiaries, see *Palmer* v. *Dunham*, 53 Hun, 637.

§ 215. **If separation directed.**—If the trust instrument directs the investment of separate portions of the fund, each by itself, it is, of course, the duty of the trustees to comply. *Bundy* v. *Bundy*, 38 N. Y. 410; *Holden* v. *N. Y. & E. Bank*, 72 N. Y. 286; *Remington* v. *Walker*, 99 N. Y. 626.

§ 216. **Separation required, but omitted.**—If a trustee should, but does not, separate his securities, and constitute distinct funds, it is held that a given beneficiary, as against the general trust estate, can only claim his proportionate share of interest at the average rate earned by the entire fund. *Duclos* v. *Benner*, 136 N. Y. 560. See the peculiar case of *Monson* v. *N. Y. S. & T. Co.*, 140 N. Y. 498.

§ 217. **Appreciation and depreciation.**—If a separation is properly made, each beneficiary must thereafter, of course, look

only to his own respective fund for his income. If the income increases, he receives it ; if it falls off, he cannot call on the other distinct funds to make him good. *Stuart* v. *Spaulding*, 30 Hun, 21 (28). If, however, no apportionment has been effected, then he may or may not gain by an increase, or lose by a decrease, in the value of the general securities of the estate, according to circumstances. Thus, in *Duclos* v. *Benner*, 136 N. Y. 560, the beneficiary who claimed a portion of a gain in value of certain investments not set apart as her share, was herself a trustee and herself had the entire management and control of the estate, and herself neglected to appropriate the securities in question for her own fund ; and further, she did not base her claim on the point now under consideration, but on the theory that these securities had been so set apart—which fact was found against her. She was held not entitled to share in the increase. On the other hand, in *Monson* v. *N. Y. S. & T. Co.*, 140 N. Y. 498, testator directed the trustees to set apart several trust funds of $20,000 each for his daughters, and gave the balance of the residuary estate to his sons. No division was in fact made. The daughters were not trustees. The value of the trust estate increased, and the daughters claimed a proportionate share of the increase, as income. This was allowed, on the ground that in the absence of a division, the trustees "must be deemed to have made such allotment proportionately in all of the securities in which the estate was invested under the provision in the will for continuing the investments of the testator if in the judgment of the executor consistent with the safety of the estate." "As long as the whole estate was thus kept, each party in fact owned his or her proportionate share of the income from and the principal of each security." It was urged that if losses had been suffered by depreciation, the daughters would nevertheless have insisted on their right to a fund of $20,000 each before the brothers should have anything. The court declined to pass on this point, merely saying that in the case supposed there would, of course, be a very different state of facts, and that the apportionment of losses would have to be decided in the light of the facts as they should then appear.[1] Still another question is presented in cases where

[1] See a discussion of this case in 7 Harv. L. Rev., p. 490.

a given trust fund has been invested in designated securities, which have thereafter increased in value, and the increase is claimed by the life beneficiary as against the remainderman. This question will be considered hereafter. *Post*, §§ 418, 419.

§ 218. **Usurious investment.**—If a guardian loans money of his ward to a third person, with notice of the trust, and takes back a bond and mortgage for the full amount, and also receives personally a *bonus* from the borrower, this does not constitute usury as against the ward, and his subsequent suit on the bond does not constitute such a ratification as to render him a party to the usury. *Fellows* v. *Longyor*, 91 N. Y. 324. The principles on which this case are decided would appear to make it generally applicable to all cases of express trust, but the court declined to pass on that question, saying (p. 332) that "while there may be trusts of such a character that an illegal and usurious loan of the funds belonging to them will render the securities taken therefor void," the case in hand is not such a case. See *post*, §§ 247, 283.

§ 219. **Securities naming trustee individually.**—It has been decided in relation to an *executor*, that if he loans money of the estate on a bond and mortgage running to him as an individual, and dies, the right of action thereon accrues solely to his personal representative, and not to his successor in the representation of the estate of the original testator. *Caulkins* v. *Bolton*, 98 N. Y. 511 (31 Hun, 458). But as to trustees compare L. 1882, ch. 185; Code C. P., § 449; *Schaefer* v. *Henkel*, 75 N. Y. 378; *Bogert* v. *Hertell*, 4 Hill, 492 (505).

§ 220. **Investments by trust company.**—The charter of a trust company may authorize the investment of trust funds in securities other than those in which individual trustees must invest. One such instance is referred to and discussed in *Davis S. M. Co.* v. *Best*, 30 Hun, 638. The general statutory provision is given in the Banking Law (L. 1892, ch. 689, §§ 158, 159, as amended L. 1893, ch. 696; Birdseye's R. S., 2d ed., pp. 229, 230).

Accounting.

§ 221. **Jurisdiction.**—The Supreme Court in equity has inherent and general jurisdiction over proceedings for the account-

ing of any trustee. The Legislature has conferred on certain other courts a limited jurisdiction in the same field, as, on the County Courts, in cases of general assignments for creditors (a subject not here discussed) and on the Surrogate's Courts in certain cases of testamentary trusts. This jurisdiction of the Surrogate's Court is purely statutory. "The provisions of this title [Title VI., Chap. XVIII., of the Code, relating to Testamentary Trustees] apply to a trust created by the will of a resident of the State, or relating to real property, situated within the State, without regard to the residence of the trustee, or the time of the execution of the will." Code C. P. § 2820. *Matter of Hawley*, 104 N. Y. 250 (263). The Supreme Court, on the other hand, may compel a trustee found here to account, even though the trust property, personal or real, is situated without the State. The proceeding relates not so much to the land as to the conduct of the trustee in relation to it. *Reading* v. *Haggin*, 58 Hun, 450 (454); *Massie* v. *Watts*, 6 Cranch. 148; *Newton* v. *Bronson*, 13 N. Y. 587; *Gardner* v. *Ogden*, 22 N. Y. 327; *Jones* v. *Jones*, 8 Misc. 660.

In the construction of the chapter of the Code relating to Surrogate's Courts, the term "testamentary trustee, includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator." Code C. P. sec. 2514, subd. 6. See *Matter of Valentine*, 1 Dem. 491, see 71 Hun, 611. In the case of such testamentary trustees, the two courts have concurrent jurisdiction over proceedings for accounting, but if proceedings have been begun in one, the other will not act, unless some special reason exists. *Cass* v. *Cass*, 61 Hun, 460; *Rogers* v. *King*, 8 Pai. Ch. 210; *Groshon* v. *Lyon*, 16 Barb. R. 467; *Wood* v. *Brown*, 34 N. Y. 337; *Christy* v. *Libby*, 5 Abb. Pr. R. (n. s.) 192; *Vanderveer* v. *McKane*, 25 Abb. N. C. 105; *Matter of Ayrault*, 81 Hun, 107, aff'd 146 N. Y. 389; *Matter of De Pierris*, 79 Hun, 279. And when complete relief can be obtained in the Surrogate's Court, the Supreme Court may, in its discretion, decline, on that

ground, to entertain an action for an accounting; but it still has jurisdiction to entertain it, *Wager* v. *Wager*, 89 N. Y. 161 (168); *Strong* v. *Harris*, 84 Hun, 314 (316); and so in case of a general assignment for creditors, *Hynes* v. *Alexander*, 2 App. Div. 109. But if the same person is both executor and testamentary trustee, he might account in one capacity in one court, and in the other capacity at the same time in the other. But such a course is improper. *Whitney* v. *Phœnix*, 4 Redf. 180. See *Remington* v. *Walker*, 21 Hun, 322. For a general discussion of the jurisdiction of the Supreme Court in matters over which the Surrogate has been given jurisdiction, whether in accountings, removal of trustees, or other matters, see *Weston* v. *Goodrich*, 86 Hun, 194; *Anderson* v. *Anderson*, 112 N. Y. 104; *Sanders* v. *Soutter*, 126 N. Y. 193; *Cook* v. *State Nat. Bank of Boston*, 52 N. Y. 106; *Royce* v. *Adams*, 123 N. Y. 402; *Hogan* v. *Kavanagh*, 138 N. Y. 417; *Dunning* v. *Dunning*, 82 Hun, 462, aff'd 147 N. Y. 686; *Widmayer* v. *Widmayer*, 76 Hun, 251; *Matter of Stilwell*, 68 Hun, 406 (410). Where trustees hold property on distinct trusts for separate beneficiaries, it is appropriate, and the most convenient and orderly course, for them to keep the accounts separate, and deal with them as separate trusts, and they may account separately as to each share. *Matter of Willets*, 112 N. Y. 289 (295). A provision in the trust instrument relieving the trustee from the necessity of accounting is nugatory and void as against the policy of the law. *Matter of Gilbert*, 2 Con. 390; *Potter* v. *McAlpine*, 3 Dem. 108 (127, 128). *Jones* v. *Newell*, 78 Hun, 290, is not believed to be in any way inconsistent with these authorities.[1]

(*a*) *In the Supreme Court.*

§ 222. Equity has general jurisdiction to entertain a suit for an accounting by a trustee, whether appointed by will or not. *Petrie* v. *Petrie*, 7 Lans. 90 (95); *Matter of Ayrault*, 81 Hun, 107, aff'd 146 N. Y. 389; *McCready* v. *Farmers' Loan & Trust Co.*, 70 Hun, 394; *Pendergast* v. *Greenfield*, 127 N. Y. 23. Where A is debtor and B creditor, and A assigns personal

[1] As to the supervision of the courts over a trust company acting as trustee, and jurisdiction to require it to account, see the Banking Law; Birdseye's R. S., 2d ed., pp. 229, 230, § 158.

property in trust to C to receive, apply on debts, including that to B, and to account, the relation between B and C is not that of debtor and creditor. The fact that C has approved a statement furnished by B showing the amounts received and paid out by him, and the balance on hand, does not create an "account stated." It does not even admit that B has any interest in it. The proper action for B is, not to recover on an "account stated," but for an accounting, and to compel the trustee to execute the trust. *Pendergast* v. *Greenfield*, 127 N. Y. 23. In an action for an accounting in equity, all persons interested must be made parties. *Petrie* v. *Petrie*, 7 Lans. 90 (95); *Sortore* v. *Scott*, 6 Lans. 271; *King* v. *Talbot*, 40 N. Y. 76. If objection is made to a lack of necessary parties, they may then be brought in. *Sherman* v. *Parish*, 53 N. Y. 483.[1] Or they may apply for leave to come in. *McCready* v. *Farmers' Loan & Trust Co.*, 70 Hun, 394. A beneficiary is not entitled to a jury trial in a suit in equity against the trustee for an accounting. *Pendergast* v. *Greenfield*, 127 N. Y. 23. If after judgment in an action for construction of a will creating a trust, a third party purchases the share of a party to the suit, the court has jurisdiction to make him a party to the accounting of the trustees, and to compel him to abide the result of the accounting and restore any excess above what he was entitled to. *Savage* v. *Sherman*, 87 N. Y. 277. As to ratification of an account, after majority, by an infant party not bound by the decree, see *Mills* v. *Hoffman*, 92 N. Y. 181.

Although equity will not assume jurisdiction of an action for an accounting by executors, disconnected from the enforcement of a trust, unless for special reasons assigned and established, *Foote* v. *Bruggerhof*, 66 Hun, 406 (417), yet the facts that the same persons are also trustees, and that the fund is to be accounted for in both capacities, and that a construction of the will is sought, constitute such reasons. *Id.* (418). For an agreement, pending accounting, to adjust and settle the respective rights of all parties, see *Spofford* v. *Pearsall*, 138 N. Y. 57. As to the effect of a settlement out of court, see *Matter of Pruyn*, 141 N. Y. 544; *Matter of Wagner*, 119 N. Y. 28;

[1] See also *Smith* v. *Central Trust Co.*, 7 App. Div. 278.

Rieben v. *Hicks*, 4 Bradf. 136. A trustee cannot, when called on to account, set up the invalidity of the trust deed on the ground that the parties thereto were infants. *Jones* v. *Butler*, 30 Barb. 641 ; s. c. 20 How. Pr. 189 (reversed 51 N. Y. 658, on the ground that assuming the validity of the trust, plaintiff was not a beneficiary thereof, and therefore could not maintain the action). Compare *Walton* v. *Stewart*, 16 N. Y. Supp. 38, aff'd 129 N. Y. 667.

The accounting in the Supreme Court, as in the Surrogate's Court, may be either voluntary, *McCready* v. *Farmers' Loan & Trust Co.*, 70 Hun, 394 ; *Matter of Ayrault*, 81 Hun, 107, aff'd 146 N. Y. 389 ; or compulsory, *Pendergast* v. *Greenfield*, 127 N. Y. 23. In other words, the suit for an accounting may be brought either by the trustee himself or by any other person interested.

Where a court of equity has jurisdiction over the parties and the subject-matter in a suit brought for one purpose, it may retain it generally in order to do complete justice between the parties, and afford all necessary and adequate relief in the matter before it, and avoid a multiplicity of actions and useless expense. *Lynch* v. *M. E. R. Co.*, 129 N. Y. 274 (279) ; *Dammert* v. *Osborn*, 140 N. Y. 30 (45). Under this principle, it has been held that where a mortgagee who brings a foreclosure action is also the trustee of the property affected by the mortgage, and all the proper parties are before the court, he may, under proper allegations in the answer, be required to account to the beneficiaries of the trust, and allow, as an offset to the amount due on the mortgage, the amount which as trustee he is found liable to pay over to them. *Ingalsbe* v. *Murphy*, 84 Hun, 181. In the case cited, the trustee had been appointed such under the will of the deceased mortgagor, which also constituted him guardian of the beneficiaries. It does not appear that as trustee he was a party. The decision seems to proceed upon the theory that by appropriating or withholding a portion of the trust property, the trustee had become indebted to the defendants in an unascertained amount which could be determined by an accounting.

(b) In the Surrogate's Court.

§ 223. There are two main classes of accounts—voluntary and

compulsory. Each of these may be either intermediate (*i.e.*, merely filed in court for purposes of information, Code C. P., § 2514, sub. 9) or *final* (*i.e.*, in connection with a proceeding to cite in the parties and have the account passed on and settled and so made final, so far as it goes, upon the parties bound by the decree, Code C. P., § 2514, sub. 8; *Glover* v. *Holley*, 2 Bradf. 291; *Remington* v. *Walker*, 21 Hun, 322, 326). The term "final" is not generally used in the statute, which refers to the decree, in such a proceeding, as a "judicial settlement." In the following classification, the cases are cited according to the particular class and subdivisions illustrated, but they frequently apply also to the corresponding subdivision in the other main class.

§ 224. **Voluntary accounting.**—(1) An *Intermediate* voluntary account may be filed at any time. Code C. P., § 2802. Concerning the contest of such an account, compare Code C. P., § 2728, with § 2726 as to accounting by an executor having a power of sale, and *post*, § 225. (2) *Judicial settlement.* There are five cases in which there may be a voluntary petition for judicial settlement. (*a*) The testamentary trustee may petition annually for a judicial settlement. The manner of so accounting and the proceedings are the same as in the case of executors; the decree thereon is appealable; it allows commissions, etc.; it has the same effect as the decree or judgment of any other court of competent jurisdiction on the final settlement of such accounts, etc. Code C. P., § 2802. (*b*) He may also petition for judicial settlement when one year has expired since the probate of the will, or when the trusts, or one or more distinct trusts, created by the will, have been or are ready to be fully executed. Code C. P., § 2810. This account may be final merely in the sense of the voluntary annual account and settlement, or, where a trust has ended, it may involve an actual winding up and final disposition for good and all. Under this class the trustee presents a petition, and a citation is issued. Code C. P., § 2810. As the Code stood, prior to recent amendments, § 2810 just cited provided that §§ 2729, 2730 and 2731 (relating to the voluntary accounting of an executor), should apply to this proceeding. But those three sections, together with § 2932, have been re-

pealed, and their substance, somewhat modified, now appears as § 2728. But the reference in § 2810 has not been corrected to correspond. This voluntary proceeding for judicial settlement might be begun (after one year, etc.), though in the meantime a proceeding for compulsory accounting had been instituted. The two proceedings would then be consolidated. So it was provided in § 2728, incorporated by reference into § 2809. That subject is now covered by § 2727. But § 2809, though not corrected, referred not only to original § 2728, but also to original § 2727. This furnishes a feature distinct from that presented by the other changes in section numbers elsewhere referred to. (*c*) The testamentary trustee may at any time voluntarily petition for judicial settlement of his account and for leave to resign. Code C. P., §§ 2814, 2819. (*d*) The executor or administrator of a deceased testamentary trustee may voluntarily account and procure a judicial settlement as to the trust property which has come into his possession. Code C. P., § 2606. As to consolidation with a proceeding for compulsory accounting in such a case, see *Matter of Shipman*, 82 Hun, 108. (*e*) An executor having a power of sale which has been executed may voluntarily petition for a judicial settlement. Code C. P., § 2728; *Baldwin* v. *Smith*, 3 App. Div. 350 (352).

§ 225. **Compulsory accounting.**—(1) *Intermediate.* "Upon the petition of a person interested, absolutely or contingently, in the estate or fund in the hands of a testamentary trustee, or in the application thereof, or of the income or other proceeds thereof, the surrogate may, in his discretion, make, at any time, an order requiring a testamentary trustee to render an intermediate account" (*i.e.*, to file one, without a proceeding to judicially settle it). Code C. P., § 2803.[1] If contest over an intermediate account is not expressly authorized, it has been said that the account may, in some cases, be made the subject of objection and inquiry. *Glaskin* v. *Sheehy*, 2 Dem. 289. Provision for contest was made in the original § 2730, incorporated into § 2810, by reference. That provision is now in § 2728, but the

[1] As to the surrogate's power to direct an intermediate account, of his own motion, see Redfield on Surrogate's Courts (5th ed.), 744.

reference to it in § 2811 is not corrected. But see *Buchan* v. *Rintoul*, 70 N.Y. 1 (4); Redf. Sur. Prac. p. 746; and compare § 2728 with § 2726, sub. 4, relating to an executor holding a power of sale. As to surrogate's power *sua sponte* to appoint a referee to examine an intermediate account, the court held, in *Buchan* v. *Rintoul*, 70 N. Y. 1, that such power existed under L. 1870, ch. 359, § 6 (applying to New York County, now superseded by the general provision in Code C. P., § 2546). There is, however, this difference between that law and the present one. That applied to "any accounting," while § 2546 is confined to "a special proceeding." And see *Matter of De Russy*, 14 N. Y. Supp. 177, aff'd 128 N. Y. 619; *Matter of Siesel*, 2 N. Y. Supp. 704. A compulsory accounting on petition, whether intermediate or not, is a special proceeding. Code C. P., § 3334. But a voluntary intermediate accounting seems not to be such. *Id.* The surrogate may, under § 2803, require an account, under a prayer for general relief, in a petition praying specifically for relief of another character. *Matter of Odell*, 52 Hun, 88; *Peck* v. *Sherwood*, 56 N. Y. 615. (2) *Judicial settlement.* (*a*) The Surrogate's Court may compel a judicial settlement of the trustee's account: "1. Where one year has expired, since the will was admitted to probate. 2. Where the trustee has been removed, or, for any other reason, his powers have ceased. 3. Where the trusts, or one or more distinct and separate trusts, created by the terms of the will, have been executed, or are ready to be executed; so that the persons beneficially interested are, by the terms of the will, or by operation of law, entitled to receive any money or other personal property from the trustee." Code C. P., § 2807. *Matter of Stevenson*, 77 Hun, 203 (207). Also, under Code C. P., § 2726, the Surrogate's Court may from time to time compel a judicial settlement of the account of an executor or administrator, where he has sold, or otherwise disposed of, any of the decedent's real property, or the rents, profits, or proceeds thereof, pursuant to a *power* contained in the decedent's will, where one year has elapsed since letters were issued to him. This section, however, does not render the proceeds of sale personal assets in the executor's hands, to be accounted for as such, or make them applicable as personalty to the payment of debts. Though they

are to be accounted for, *Matter of Valentine*, 1 Misc. 491 (493), see 71 Hun, 611, they retain their character of real property. *Matter of McComb*, 117 N. Y. 378; *Matter of Bingham*, 127 N. Y. 296. See *post*, § 603. If, however, the power conferred on the executor is broad enough to effect a conversion, or to warrant a sale for the payment of debts if necessary, then, by force of the instrument, the converted fund, or proceeds, become chargeable as assets in the hands of the executor, for which he must account as such. *Stagg* v. *Jackson*, 1 N. Y. 206; *Glacius* v. *Fogel*, 88 N. Y. 434; *Hood* v. *Hood*, 85 N. Y. 561; *Erwin* v. *Loper*, 43 N. Y. 521; *Matter of Gantert*, 136 N. Y. 106. In such case, the proceeds are to be included in any account, whether voluntary or compulsory, and whether intermediate or on petition for judicial settlement.

Any person beneficially interested in the execution of any of the trusts; or any person in behalf of an infant so beneficially interested; or a surety in the trustee's bond given as prescribed in the title covering the section cited, or the legal representative of such a surety, may present a petition for a judicial settlement, etc., as prescribed in § 2807. Code C. P., § 2808. The proceedings are regulated by § 2808 *et seq.* Upon such a petition, a citation must issue, save that if the account of the trustee has been judicially settled within a year before the petition is presented, the surrogate may, in his discretion, entertain, or decline to entertain, the petition. Code C. P., § 2808. *Matter of McCarter*, 94 N. Y. 558. A judicial settlement purporting to terminate the accounts, and wind up the trust, presumptively embraces all matters for which the trustee is liable to account. If new facts exist, calling for a further accounting, they should, in a subsequent petition, be alleged. *Matter of Hood*, 90 N. Y. 512. By § 2809, the sections 2727 and 2728 are rendered applicable to this proceeding. By an amendment of 1893, these incorporated sections were consolidated, and now constitute the latter part of present § 2727; but the reference to them in § 2809 was not changed to correspond. They are construed in *Matter of Wagner*, 119 N. Y. 28; *Campbell* v. *Purdy*, 5 Redf. 434; *Schlegel* v. *Winckel*, 2 Dem. 232. (*b*) The executor or administrator of a deceased testamentary trustee may be required to account. Code C. P., § 2606. Under this section, the surrogate's power is precisely the same as if the deceased trustee

had been removed in his lifetime, and had been called upon to deliver up the assets. *Matter of Clark*, 119 N. Y. 427. But as to consolidating such a proceeding with a voluntary proceeding to account, see *Matter of Shipman*, 82 Hun, 108. The application for an accounting may be made immediately upon appointment of the executor or administrator. *Matter of Wiley*, 119 N. Y. 642. Further cases under this section are: *Matter of Fithian*, 5 Dem. 305, aff'd 44 Hun, 457; *Potter* v. *Ogden*, 136 N. Y. 384. The surrogate has no power to require an account from the executor of a trustee who had been appointed by the Supreme Court as successor of a testamentary trustee. *Matter of Hazard*, 51 Hun, 201. As to allowing a supplemental account, see *Matter of Schneider*, 1 App. Div. 39.

§ 226. **Both executor and trustee.**—Where the same person is executor and testamentary trustee, and resigns or is removed, in both capacities; in either case, proceedings upon the petition for the resignation or removal, as the case requires, of the testamentary trustee, and for the judicial settlement of his account, may be taken, as prescribed in Title VI. (Code C. P., §§ 2802–2820), in connection with, or separately from, the like proceedings upon the petition for the revocation of the letters, as the surrogate directs. Code C. P., § 2819. In other cases, proceedings taken by or against him, as prescribed in Title VI., do not affect him as executor or administrator, or the creditors of, or persons interested in, the general estate. Code C. P., § 2819. And the settlement of his account as executor does not bar a claim against him as trustee. *Pittman* v. *Johnson*, 35 Hun, 38 (41), aff'd 102 N. Y. 742.

§ 227. **Co-trustees.**—One trustee may call his co-trustee to account. See *Buchan* v. *Rintoul*, 70 N. Y. 1. *Matter of Rumsey*, 18 N. Y. Supp. 402.

§ 228. **Scope of jurisdiction.**—On a settlement in the surrogate's court, of the accounts of a testamentary trustee, that court has no authority to enter upon the hearing and determination of any collateral and incidental disputes involving the right or title of either of the claimants to an interest in the estate. *Van Sin-*

deren v. *Lawrence*, 50 Hun, 272, save under its limited and incidental power to construe the will. *Post*, § 754 (*b*). Compare Code C. P., §§ 2743, 2811, 2812; *Matter of Underhill*, 117 N. Y. 471; *Matter of Rogers*, 2 Con. 139.

§ 229. **Other statutes rendered applicable.**—Attention has already been called to the fact that the Article of the Code dealing with Testamentary Trustees refers to and incorporates certain other sections relating to executors, and that while the latter have been renumbered, the references thereto have not been corrected. The same statement applies to most of the following sections referred to in § 2811 as generally applicable to accountings by a testamentary trustee—namely, §§ 2734–2737, inclusive; 2739–2741, inclusive; 2743, 2744, 2746. These sections, as originally referred to, related to the following matters: § 2734 related to vouchers. (That number now belongs to a section relating to distribution of the personal property of a married woman. The section on vouchers is now § 2729.) § 2735 related to the examination of the accounting party. (That subject is now covered by § 2729. There is no present § 2735.) §§ 2736, 2737, referred to compensation. (That subject is now covered by § 2730. There are no present §§ 2736, 2737.) §§ 2739, 2740 referred to the determination of claims by or against the accounting party, and the effect of the statute of limitations thereon. (These subjects are now covered by § 2731. There are no present §§ 2739, 2740.) § 2741 related to an allowance for property lost without fault. (This subject is now covered by § 2729. There is no present § 2741.) § 2743 related to decree for distribution and payment. (This reference has not been disturbed, and is correct.) § 2744 related to decree for delivery and assignment of property in lieu of money value. (This has not been disturbed, and is correct.) § 2746 related to decree for payment of the distributive share of an infant. (This section has been amended, but still covers the same subject.) § 2811 also provides for an affidavit to be annexed to each account, and in that connection referred to, and with certain modifications incorporated, the provisions of § 2733. (The section thus numbered now refers to "advancement;" the affidavit in question is now provided for in present § 2729.)

§ 230. **Controversy over right to share.**—"Upon a judicial settlement of the account of a testamentary trustee, a controversy which arises, respecting the right of a party to share in the money or other personal property to be paid, distributed, or delivered over, must be determined in the same manner as other issues are determined. If such a controversy remains undetermined, after the determination of all other questions upon which the distribution of the fund, or the delivery of the personal property depends, the decree must direct that a sum, sufficient to satisfy the claim in controversy, or the proportion to which it is entitled, together with the probable amount of the interest and costs, and, if the case so requires, that the personal property in controversy, be retained in the hands of the accounting party; or that the money be deposited in a safe bank or trust company, subject to the surrogate's order, for the purpose of being applied to the payment of the claim, when it is due, recovered or settled; and that so much thereof, as is not needed for that purpose, be afterwards distributed according to law." Code C. P., § 2812.

§ 231. **Parties.**—The parties to be cited in proceedings for judicial settlement are specified in the sections already cited, under the respective subdivisions. The term "person interested" is defined in Code C. P., § 2514, subd. 11. *Hood* v. *Hood*, 85 N. Y. 561 (579). Residuary legatees are not called on to verify the regularity of proceedings on accounting by an executor-trustee as against those interested in a trust fund, not cited, where they receive merely their own, and the fund is afterward wasted by the executor-trustee. *Mills* v. *Smith*, 141 N. Y. 256.

§ 232. **Effect of decree.**—"A decree, made upon a judicial settlement of the account of a testamentary trustee, as prescribed in this title, or the judgment rendered upon an appeal from such a decree, has the same force, as a judgment of the Supreme Court to the same effect, as against each party who was duly cited or appeared, and every person who would be bound by such a judgment, rendered in an action between the same parties." Code C. P., § 2813. See also §§ 2802, 2819. *Bald-*

win v. *Smith*, 91 Hun, 230; see 3 App. Div. 350 (352). If the account is based on prior accounts, the decree covers all. *Matter of Tilden*, 98 N. Y. 434 (441). The recitals of due service, in the decree, upon parties not appearing, or upon infants, are not conclusive. It is for the trustee to see to it that the proofs of due service are preserved. *Hood* v. *Hood*, 85 N. Y. 561 (578, 579).

§ 233. **Procedure.**—The procedure in proceedings relating to the accounting of a testamentary trustee, is in general regulated by the provisions and practice applicable to executors; it constitutes a branch of the law of Surrogates' Courts; and is fully treated in Mr. Redfield's well-known work on that subject.

(6) *The Trustee's Liability.*

General Principles.

§ 234. **General rule.**—The trustee is, of course, held strictly accountable for a due performance of the duties, and due exercise of the powers incident to his position, and a diligent obedience to the law and the orders of the court. He is required to use good judgment, to display integrity and impartiality, and to make no use of his position for personal advantage.

§ 235. **Same—Qualified.**—The trust instrument, however, may by its terms relieve him to some extent from the strict accountability which would otherwise exist, and if he is thus expressly released from liability except for wilful misconduct, he cannot be held responsible for the results of his mere improvidence or carelessness. *Crabb* v. *Young*, 92 N. Y. 56 (65, 66). It is also true, that even apart from such release by the trust instrument, the court is inclined to regard with leniency the mere mistakes of a trustee who has acted in perfect good faith. *Id.* (66); *Purdy* v. *Lynch*, 145 N. Y. 462. And in a doubtful case, where it is difficult for the trustee to decide how to act (*e.g.*, whether to retain or convert certain securities in which the testator had invested the funds), he is justified in acting on a memorandum of advice given to him by the testator for his guidance. *Matter of Weston*, 91 N. Y. 502.

§ 236. **Devastavit.**—Where a trustee invests the trust fund in his own business, or loans it to other persons for use in business, or employs it in the prosecution of mercantile, commercial, and manufacturing enterprises, or speculative adventures, the act constitutes a *devastavit*. *Matter of Myers*, 131 N. Y. 409. Where the same person is both executor and trustee, and is chargeable with a *devastavit*, relating to the trust fund, the question whether he committed the same as executor or as trustee is to be determined according as the trust is attached to the executorial office, or is personal and distinct. *Matter of Hood*, 98 N. Y. 363; *Matter of Hood*, 104 N. Y. 103 (107); *Cluff* v. *Day*, 124 N. Y. 195 (201). See *post*, 264 *et seq.*

Although the trust instrument is silent on the subject, those who claim in remainder under it are interested in the management of the estate, and the trustee of the life estate owes them certain duties which a court of equity may enforce. He stands, in respect to these duties, as a trustee for the remaindermen; this is an implied and not an express trust. If he is guilty of any species of waste calculated to materially injure or destroy the value of the estate in remainder, it is perfectly competent, and in truth is the constant practice in this country as well as England, for the remainderman to resort to the prompt and efficacious remedy afforded by an action for an injunction. In such an action a court of equity might require security of the trustee for the due performance of those duties which the law casts upon him in respect to the preservation of the trust estate. *Matter of Livingston*, 34 N. Y. 555 (567, 568). But the remainderman's right to protection is based not upon the express trust under which the trustee holds title for the use of the beneficiaries, but upon the implied trust which the law raises in favor of any remainderman against any life tenant in possession. *Id.* The statute (Real Property L., § 92) authorizing the removal of a trustee for violation of his trust, etc., "in an action brought or on a petition presented, by any person *interested in the trust*," does not therefore authorize a suit or proceeding for his removal, by a remainderman. He is not interested in *the* trust—*i.e.*, the express trust. *Id.*

A trustee is not obliged to take legal steps to get possession of property which *may* have belonged to testator and, if so, be-

longs to the trust, unless he has evidence to support his claim ; if the question is problematical, and he is advised that he has no ground of action, by competent counsel, and acts in good faith, he is not chargeable as for a *devastavit*. *O'Conner* v. *Gifford*, 117 N. Y. 275 (278). See further the following sections.

§ 237. **Unauthorized sales.**—If a trustee sells trust property without due authority derived either from the trust instrument or from the court, he is personally liable for damage resulting to the estate or fund. See *James* v. *Cowing*, 82 N. Y. 449 (455 *et seq.*).

§ 238. **On covenants.**—See *post*, § 464.

§ 239. **Delay in investing.**—It is the duty of trustees holding funds for investment to use due diligence to keep them invested. Some time usually elapses before investments can be made, and in charging a trustee with interest, six months from the time the money was received, is usually allowed as a reasonable time. After a reasonable time, trustees are *prima facie* liable for interest. *Lent* v. *Howard*, 89 N. Y. 169 (180), and cases there cited ; *Matter of Bradley*, 1 Con. 106. In some cases, as where there is a specific direction to invest in certain government securities, which could be purchased on the market at any time, even less leeway for investment should be allowed. *Gilman* v. *Gilman*, 2 Lans. 1 (5).

If an action properly lies against all the trustees, as, to compel a proper investment of trust funds, and the payment of arrears of interest, where all are chargeable, an action against a survivor only, omitting the representatives of deceased trustees against whom the one sued would have an action over, is objectionable, and while it might, as an act of discretion, be dismissed, it should be allowed to stand over, that all parties may be brought in and the entire controversy settled in the one suit. *Sherman* v. *Parish*, 53 N. Y. 483.

§ 240. **Delay in paying.**—So where the trustee holds funds which it is his duty not to retain but to pay over at once, and he wrongfully deposits them and leaves them on deposit, the same

liability arises. *Harlow* v. *Mills*, 58 Hun, 391, aff'd 128 N. Y. 650; *Matter of Knight*, 21 Abb. N. C. 388.

§ 241. **Delay in selling.**—Where an executor is given a peremptory power to sell certain real estate and with the proceeds pay off a mortgage on other land devised in trust, his conduct in delaying a sale, and refusing proper offers, may be such as to render him liable for the interest on the mortgage from the date when he could and should have sold. *Matter of Quin*, 1 Con. 381.

§ 242. **Improper investments but no loss.**—If improper investments have not in fact resulted in loss, and the securities have again been converted into cash, the trustee's liability arising out of the original illegal investment thereupon ceases; he is not liable for future loss of the same fund, except on new grounds. *Matter of Foster*, 15 Hun, 387 (394).

§ 243. **Deposit in own account.**—A deposit of trust funds in his individual account, renders him liable for any loss that ensues; *Matter of Nesmith*, 140 N. Y. 609 (616); 1 Perry on Trusts, § 443, and cases there cited; *Matter of Barnes*, 140 N. Y. 468 (472); whether it is thus merged with his own money or not. 1 Perry on Trusts, *ubi supra*. But if, instead of depositing funds to his own account, a trustee deposits them in bank (when a deposit is proper) in a separate account, as trustee, he is then relieved of liability for loss. *People* v. *Faulkner*, 107 N. Y. 477. This case relates to a surrogate who received funds under an order made pursuant to statute, and deposited them in a private bank to his account as surrogate. The same rule applies in such a case and in the case of trustees. *Id.*, pp. 488, 489. Also, *Matter of Maxwell*, 1 Con. 230. For cases illustrating the mingling of trust and personal funds, see *Hooley* v. *Gieve*, 9 Abb. N. C. 8; *Woodruff* v. *Boyden*, 3 Abb. N. C. 29; *Hasler* v. *Hasler*, 1 Bradf. 248; *Ogilvie* v. *Ogilvie*, 1 Bradf. 356; *Berwick* v. *Halsey*, 4 Redf. 18; *Freeman* v. *Freeman*, 4 Redf. 211; *Rorke* v. *McConville*, 4 Redf. 291; *Matter of Mairs*, 4 Redf. 160; *Spencer* v. *Popham*, 5 Redf. 425; *DuBois* v. *Brown*, 1 Dem. 317; *Wells* v. *Wallace*, 2 Redf. 58;

Matter of Stafford, 11 Barb. R. 353 ; *Estate of Hood*, Tucker, 396 ; *U. S. Trust Co.* v. *Bixby*, 2 Dem. 494.

§ 244. **Deposits—Drafts—Liability of bank.**—A bank in which trust funds are deposited as such, may be chargeable for the unlawful acts of the trustee ; as, for example, where a trustee deposited funds in his name "as trustee," in a bank of which he was the president, and the active and controlling manager ; he individually owned stock of the bank, which was worthless ; he was heavily indebted to the bank in a sum exceeding the trust deposit ; his own pecuniary means were exhausted ; under these circumstances, he transferred the bank stock from himself individually, through a dummy, to himself as trustee, at par, and as trustee checked out the par value thereof from the trust fund and deposited it to his personal credit in the bank. In a suit by the trustee's successor to have the transfer of stock set aside as fraudulent, and for an adjudication declaring the amount of the deposit in the trust account, which was transferred to the trustee's personal account, to be a valid claim against the bank, the latter was held liable. "The knowledge of Ganson [the trustee] as an individual or as an executor was not imputable to the bank merely because he was its president, but because when it acted through him as president, in any transaction where that knowledge was material and applicable, it acted through an agent who at that very time had a knowledge of facts which gave a character to the transaction as fair and justifiable, or the reverse, and whose duty it was to make that knowledge known to its principal." The result would have been the same if another person had been the acting agent of the bank, and such agent had acquired the knowledge in question from the trustee or from other sources. *Holden* v. *N. Y. & Erie Bank*, 72 N. Y. 286. Where a deposit by one, in a bank, as trustee for another, constitutes a trust, it is the depositor, and not the bank, that is the trustee. Thus, if the beneficiary sues the wrongful recipient of the deposit, who has withdrawn it from the bank, he thereby ratifies the act of the bank in so paying it, which would not be the case if the bank were the trustee, and had paid the money to the wrong person. *Fowler* v. *B. S. Bank*, 113 N. Y. 450.

§ 245. **Trustee's acceptance.**—Where a trustee accepts a draft drawn on him by a beneficiary entitled to draw, and after his name both as drawee and as acceptor, the mere word "trustee" appears, and the draft does not direct payment from a specific fund named, the trustee is personally liable as acceptor. *Schmittler* v. *Simon*, 101 N. Y. 554. And where the construction of the terms of the draft are doubtful, so that it is not clear whether it directed payment from a specified fund, or called for payments generally and authorized the drawee to reimburse himself from the fund named, the latter view will, in the interest of a *bona fide* holder of the paper, for value, be adopted, and the acceptor be held personally liable. *Id.* and s. c. 114 N. Y. 176. But if it appear that the drawer and the acceptor used and understood the terms employed as a direction to pay only from the trust fund, and the liability of the acceptor as existing only as to his representative capacity, and the payee was aware of these facts, then the terms of the draft, being fairly open to either meaning, may be read in accordance with this understanding. *Schmittler* v. *Simon*, 114 N. Y. 176. See also *Hood* v. *Hallenbeck*, 7 Hun, 362; *Stearns* v. *Allen*, 25 Hun, 558; *Whitford* v. *Laidler*, 94 N. Y. 145. Compare cases cited in Abb. Trial Ev. 402, note 9.

§ 246. **For acts of agent.**—If a trustee improperly entrusts assets to an agent who loses or squanders them or otherwise produces loss, the trustee is liable. *Matter of Schott*, Tucker, 337. Compare *McCabe* v. *Fowler*, 84 N. Y. 314; *Earle* v. *Earle*, 93 N. Y. 104 (112); *Adair* v. *Brimmer*, 74 N. Y. 539 (564), and *post*, §§ 247, 249, 250, 281.

§ 247. **Usury.**—Neither trustee nor trust estate is liable for the unauthorized act of an agent in taking usury on a loan, for his own benefit and without the knowledge or assent of the trustee. *Van Wyck* v. *Watters*, 81 N. Y. 352 (355), affirming 16 Hun, 209 *sub nom.* *Van Wyck* v. *Walters*. (As to usury taken by co-trustee or by sole trustee, see *post*, § 283.)

§ 248. **Executory contracts.**—This subject is discussed under that of the trustee's authority to charge upon the trust estate the

expense of repairs, services, etc., rendered on his order for the estate. *Ante*, § 177 *et seq.*; *post*, § 281.

§ 249. **Loss by theft.**—The trustee, in the absence of negligence, is not liable to make good funds stolen from him. *Furman* v. *Coe*, 1 Cai. Cas. 96.

§ 250. **Custody of securities.**—A trustee is not a guarantor for the safety of the trust securities. If he exercises due judgment and caution in leaving them in the custody of a proper person, he is not liable for misappropriation by the depositary, which there was no reason to anticipate.. *McCabe* v. *Fowler*, 84 N. Y. 314. Except as affected by the new statutes, in reference to charitable, etc., trusts, it is not the province of the attorney-general to bring an action against trustees based on waste, misapplication of the estate, or any malversation in office. *People* v. *Simonson*, 126 N. Y. 299 (304). Where power is given to an executor to sell land at any time within a term named, and in the mean time he is to have the possession and income beneficially, and the circumstances are such as to furnish ample security, on his accounting, to legatees who are to be paid from the proceeds of sale, equity will not entertain an action to restrain him from cutting and selling timber from the land. It seems that such an act is in execution of the power, and turns the timber, as sold, into funds in his hands as executor. But if wrongful, he will be held liable on his accounting. *Keller* v. *Ogsbury*, 121 N. Y. 362.

§ 251. **Liability for interest.**—If a trustee holds funds which can and should be invested, and through fraud, or mismanagement or other breach of trust, he does not invest them, or invests them in his own business, or that of others, or in commercial or manufacturing enterprises or speculative ventures, he will be charged with interest, as a general rule. *Price* v. *Holman*, 135 N. Y. 124; *Matter of Barnes*, 140 N. Y. 468 (471); *Cook* v. *Lowry*, 95 N. Y. 103 (113); *Reynolds* v. *Sisson*, 78 Hun, 595; or, at the option of the beneficiary, with the profits earned, *Utica Ins. Co.* v. *Lynch*, 11 Pai. 520; *Matter of Myers*, 131 N. Y. 409; *Deobold* v. *Oppermann*, 111 N. Y. 531 (538);

King v. *Talbot*, 40 N. Y. 76 (86); *Wilmerding* v. *McKesson*, 103 N. Y. 329.[1] But the beneficiary cannot have rests, at selected periods, so as to claim profits when they exceeded interest, and interest when it exceeded profits. If profits have first exceeded interest, and then there has been actual loss, if the beneficiary claims *profits* he can only recover *net* profits for the entire period. *Baker* v. *Disbrow*, 18 Hun, 29, aff'd 79 N. Y. 631. And where the trustee has made separate unauthorized investments of separate parts of the fund, the beneficiary's right to elect applies to each investment by itself, so that, according as his interest may appear, he may approve some and accept the profits, and reject others and insist on legal interest. *King* v. *Talbot*, 40 N. Y. 76 (91); compare *Matter of Porter*, 5 Misc. 274; and he may so elect even during the pendency of the trust. *Gillespie* v. *Brooks*, 2 Redf. 349 (360). And a beneficiary is not required to keep watch of all the trustee's acts, so as to be prepared at once to protest in case of improper investments. It is the duty of the trustee, and not of the beneficiary, to attend to the investment of the estate. *Matter of Foster*, 15 Hun, 387 (393). But it may be the beneficiary's duty, if he proposes to object to the trustee's failure to invest small sums, to find and call to his attention suitable opportunities for investing the same. *Rapalje* v. *Norsworthy's Exrs.*, 1 Sandf. Ch. 399 (405). And the mere fact that the trustee deposits trust moneys with his own, or uses them in his own business, does not necessarily render him liable for interest, as, for instance, where the funds are too small to make it practicable to invest them, or where the trustee may be called on at any moment to pay over the fund to the beneficiary. In order to make him liable for interest there must be superadded a breach of trust; a neglect or refusal to invest the funds at the time or in the mode which the trust instrument or the law itself has pointed out. *Rapalje* v. *Norsworthy's Exrs.*, 1 Sandf. Ch. 399 (404); *Jacot* v. *Emmett*, 11 Pai. Ch. 142 (145); *Price* v. *Holman*, 135 N. Y. 124 (133); *Matter of Barnes*, 140 N. Y. 468; *Matter of Nesmith*, 140 N. Y. 609 (615–17); *Shuttleworth* v. *Winter*, 55 N. Y. 624

[1] As to the rate of interest to be allowed on trust funds by trust companies when acting as trustees under a court appointment, see the Banking Law, L. 1892, Ch. 689, § 160; Birdseye's R. S. (2d ed.), p. 230.

(631); *Matter of Clark*, 16 Misc. 405. As to whether, in deciding whether a trustee had in his hands a fund large enough to call for investment thereof, it is permissible to take into account the fact that he held several entirely distinct trust funds which, if combined, would have afforded such a gross sum, see *Rapalje* v. *Norsworthy's Exrs.*, 1 Sandf. Ch. 399. In a case where a trustee has made use of the funds, but no breach of trust is involved, he will be charged with interest if it be proved that he has earned interest. *Rapalje* v. *Norsworthy's Exrs.*, 1 Sandf. Ch. 399 (404). As to liability for interest, see also note to *Kellett* v. *Rathbun*, 4 Pai. Ch. 102 (109), Banks' Annotated Ed. If when rents and income are due and payable, the beneficiary voluntarily leaves them in the trustee's hands, they do not draw interest. *Holley* v. *S. G.*, 4 Edw. Ch. 284 (286). If a penalty is incurred, owing to the negligent failure of the trustee to pay taxes when due, and is paid by him, he cannot be credited therewith on his accounting. *Stubbs* v. *Stubbs*, 4 Redf. 170. If commissions are prematurely withdrawn by the trustee, he is chargeable with interest thereon. *Matter of Peyser*, 5 Dem, 244 (247); *Wheelwright* v. *Wheelwright*, 2 Redf. 501; *Matter of Freeman*, 4 Redf. 211 (215); *U. S. Trust Co.* v. *Bixby*. 2 Dem. 494. But see *Wyckoff* v. *Van Siclen*, 3 Dem. 75. But not solely on that ground, if they had then been actually earned. *Beard* v. *Beard*, 140 N. Y. 260 (265, 266); *Price* v. *Holman*, 135 N. Y. 124; *Whitney* v. *Phœnix*, 4 Redf. 180 (195). If commissions which have been earned, but not allowed, are in good faith withdrawn by the trustee, under an assumption that he is entitled so to do, this mere fact, in the absence of any resulting loss to the estate, is not ground for charging him with interest thereon. *Beard* v. *Beard*, 140 N. Y. 260 (266).

§ 252. **Rate of interest.**—It is only in extraordinary cases that the trustee is charged with compound interest. *Price* v. *Holman*, 135 N. Y. 124 (133, 134). For instances of such charges, see *Hannahs* v. *Hannahs*, 68 N. Y. 610; *Brown* v. *Knapp*, 79 N. Y. 136 (145); *Tucker* v. *McDermott*, 2 Redf. 312; *Morgan* v. *Morgan*, 4 Dem. 353 (356); *Smith* v. *Rockefeller*, 3 Hun, 295; *Reynolds* v. *Sisson*, 78 Hun, 595 (598); *Utica Ins. Co.* v. *Lynch*, 11 Pai. Ch. 520. In *King* v. *Talbot*,

40 N. Y. 76, it was held that in case of bad faith or wilful failure of duty, the highest rate of interest should be imposed, but where, as in that case, a mistake occurs in investing funds, but the trustee acted honestly and in good faith, the rate of interest to be charged rests in a discretion which permits the consideration of all the circumstances, which show that substantial justice can be done to the *cestui que trust*, by allowing a less rate. Accordingly, following the English rule in such cases, of charging four per cent where the legal rate was five, the court charged the trustee six per cent, the legal rate in New York being then seven per cent. See also *Shuttleworth* v. *Winter*, 55 N. Y. 624; *Haskin* v. *Teller*, 3 Redf. 316 (323.) In *Clarkson* v. *De Peyster*, Hopk. Ch. 424 (426), it was said that the English rule of "equitable interest" at one per cent less than the legal rate, had never been adopted in this State. But the court in *King* v. *Talbot*, *supra*, say that there is nothing in *Clarkson* v. *De Peyster*, *supra*, that affects the soundness of their adoption of the English rule. To the same effect appear to be *Wilmerding* v. *McKesson*, 103 N. Y. 329 (341); *Bruen* v. *Gillet*, 115 N. Y. 10 (21). In cases where there has been an active breach of trust, resulting in loss, but the circumstances are not sufficiently aggravated to call for compound interest, legal interest is commonly charged, but each case must depend to a considerable degree on its own circumstances, as affected by the degree of wrongdoing, the probable actual loss, the personal profits, if any, realized by the trustee, etc. *Cook* v. *Lowry*, 95 N. Y. 103 (114) and cases there cited; *Morgan* v. *Morgan*, 4 Dem. 353 (356) and cases there cited. Where there is wilful neglect, as, a default in payment of taxes when the trustee has sufficient funds of the estate to pay them, he is personally liable to the estate for the amount of the resulting interest payable on the tax. *Tickel* v. *Quinn*, 1 Dem 423 (432). In *Harlow* v. *Mills*, 58 Hun, 391, aff'd 128 N. Y. 650, an administrator, who was allowed, by those entitled, to receive payment for certain land sold, and whose duty it was to pay over the proceeds at once, deposited the fund in a bank, and left it there two months. The bank failed. The administrator, who had received the money not as such, but individually, and under an implied contract, was for that reason held liable, not only for the lost fund, but for interest at the legal rate, the fact that

he did not hold as trustee, executor, or administrator being held to distinguish the case from *King* v. *Talbot*, *supra*. As to rate of interest, see also *Matter of Commonwealth F. I. Co.*, 32 Hun, 78, and cases there cited ; *Gilman* v. *Gilman*, 2 Lans. 1. In a case of mere neglect to invest, without bad faith, only simple interest will be charged. *Matter of Kennedy*, 2 Con. 216, which see for a general discussion of the principles to be pursued in charging a trustee with simple or with compound interest ; or with profits ; or making no charge. But even in a case of mere neglect to invest, compound interest may sometimes be allowed, as where a will directs the trustee to deposit income in a savings bank to accumulate, and he fails to do so ; here he will be charged with the interest he might have received from a bank, which involves semi-annual rests. *Shepard* v. *Patterson*, 3 Dem. 183. Compare *Matter of Butler*, 1 Con. 58 (80).

§ 253. **Interest against estate.**—In regard to liability for interest, a distinction exists between claims against a trustee individually, as in the cases just considered, and claims against the estate itself, as where a legatee demands interest on a legacy, the payment of which has been deferred. In the latter case the legatee is a creditor, and entitled to legal interest regardless of whether the estate was or was not able to pay the legacy when due, or whether it has, or could have, earned legal interest on the legacy or not. *Hoffman* v. *Penn. Hospital*, 1 Dem. 118 ; *Wheeler* v. *Ruthven*, 2 Redf. 495, see s. c. 74 N. Y. 428.

§ 254. **Summary proceeding to compel payment or delivery.**—" Where a person is entitled, by the terms of the will, to the payment of money, or the delivery of personal property, by a testamentary trustee, he may present to the surrogate's court a written petition, duly verified, setting forth the facts which entitle him to the payment or delivery, and praying for a decree, directing payment or delivery accordingly ; and that the testamentary trustee may be cited to show cause, why such a decree should not be made. If the petitioner is so entitled, only upon the happening of a contingency, or after the expiration of a certain time, he must show in his petition, that his right to the money or other property has become absolute. Upon the pres-

entation of the petition, the surrogate must issue a citation accordingly." Code C. P., § 2804. "Upon the return of a citation, issued as prescribed in the last section, if the testamentary trustee files a written answer, duly verified, setting forth facts, which show that it is doubtful, whether the petitioner's claim is valid and legal, and denying its validity or legality, absolutely or upon his information and belief, a decree must be made, dismissing the petition, without prejudice to an action in behalf of the petitioner for an accounting; otherwise, the surrogate must hear the allegations and proofs of the parties, and must make such a decree in the premises, as justice requires. In a proper case, the decree may require the testamentary trustee, who is unable to deliver personal property to which the petitioner is entitled, to pay the value thereof." Code C. P., § 2805. "Where it appears, upon the presentation of a petition as prescribed in the last section but one, that a decree, made pursuant to the prayer thereof, might affect the rights of other persons, with respect to the estate or fund held by the testamentary trustee, the citation must also be directed to those persons. Where that fact appears, upon the return of the citation, or upon the hearing, and it also appears presumptively that the petitioner is entitled to a decree, all the persons, whose rights may be so affected, must be brought in by a supplemental citation, before a decree is made." Code C. P., § 2806. The denial of validity, etc., is essential to a dismissal. *Matter of McCarter*, 94 N. Y. 558 (562).

§ 255. **Contempt proceedings.**—If the trustee refuses or neglects to pay over money or perform any other acts duly directed by the court, he may be subjected to proceedings to punish him for contempt. *Matter of Dissosway*, 91 N. Y. 235; *Hosack* v. *Blunt*, 11 Pai. Ch. 603; Code C. P., §§ 8, 2555, by fine or imprisonment, or both, Code C. P., § 9, and § 2266 *et seq.*, and in particular §§ 2284, 2285. *Matter of Morris*, 45 Hun, 167; *Moffat* v. *Herman*, 116 N. Y. 131; *People* v. *Van Buren*, 136 N. Y. 252. See also *post*, § 728.

§ 256. **Release from liability.**—Where a trustee has become liable to the beneficiary for wrongful acts, the latter may in

certain cases relieve the trustee from liability (*e.g.*, for unauthorized investments), though while the trust continues, the beneficiary may reconsider, and may, as to the future, call for a strict performance of legal obligations. *Sherman* v. *Parish*, 53 N. Y. 483 (491, 492); *Boerum* v. *Schenck*, 41 N. Y. 182; *Arthur* v. *Nelson*, 1 Dem. 337; see *post*, § 280. Thus, if a trustee, at a sale of trust property, himself buys it in, with the consent of the beneficiary, who receives the proceeds with intent to ratify the transaction, the latter cannot demand a resale. *Boerum* v. *Schenck*, 41 N. Y. 182 (193, 194). But if the beneficiaries are incompetent to waive their rights (*e.g.*, through lunacy), or if they accept the proceeds under an explicit understanding that they reserve their right to avoid the sale, they are not estopped. *Id.* In such case a resale may be ordered, but it will not accrue to the benefit of one beneficiary who is estopped, either by actual ratification or by the effect of a judgment establishing the original sale as to him and standing unreversed. *Id.* Even as to him, if he has subsequently succeeded to the rights of others not estopped, he may, as to such rights, share in the benefit of the new sale. *Id.* Concerning acquiescence by a beneficiary in a breach of trust, and its effect as an estoppel, and the method of arranging the equities on a resale, see reporter's note, citing many authorities, in 41 N. Y., p. 200. A beneficiary is not estopped by the mere fact of giving a receipt in full, from showing that in fact the full amount payable has not been paid. *Matter of Rutherford*, 5 Dem. 499; also see *Matter of Wiggin*, 1 Dem. 568. And in order to establish such ratification or confirmation, it must appear that the party confirming labored under no disability; that the confirmation was a deliberate act; that there was no false suggestion or reservation; that the beneficiary was made aware of all the material circumstances of the case, and knew that the law entitled him to impeach the transaction in a court of equity. *Luers* v. *Brunjes*, 5 Redf. 32 (41 *et seq.*); *Cumberland Coal & Iron Co.* v. *Sherman*, 30 Barb. 553; *Adair* v. *Brimmer*, 74 N. Y. 539. It would appear that these cases fall within the class where the beneficiary would not be bound by notice possessed by his attorney or other representative in general matters connected with the trust. *Mandeville* v. *Reynolds*, 68 N. Y. 528 (540). A beneficiary may, however, if

these conditions are complied with, release the trustees, or may release a part of them, and hold the others as to their *pro rata* share of the liability. *Cocks* v. *Barlow*, 5 Redf. 406 (412). But it is to be remembered that under trusts to receive and accumulate, the beneficiaries, being necessarily infants, while the term continues are never *sui juris;* and that under trusts to receive and apply rents or income, the beneficiaries, even if otherwise competent, are expressly disabled by statute to transfer their rights, by assignment or otherwise, Real Prop. L., § 83, and that this provision cannot be evaded by the mere device of conniving at a misappropriation or other breach of trust by the trustee, by adopting the form of a ratification or waiver. Express statutory provisions intended for the very purpose of protecting the beneficiary even as against his own desire to control the property, cannot be nullified by any theory of estoppel. *Douglas* v. *Cruger*, 80 N. Y. 15 (20); see *Bliven* v. *Robinson*, 83 Hun, 208 (209). As to the effect of a decree of a competent court, in closing the door to further disputes over the trustee's liability, see the subjects of Accounting; Construction; and Parties.

§ 257. **Liability after discharge.**—If a trustee invest in unauthorized securities, and turns the same over to his successor, and is discharged, he nevertheless continues liable for losses until the funds can be reinvested in proper securities. *Matter of Foster*, 15 Hun, 387 (393). And further, it does not follow that because a trust has terminated, the liability of the trustee to account, and to make good any loss for which he is responsible, ceases at the same time. A trustee cannot discharge himself except by order of the court, or, the trust having ended and the property vested beneficially, the consent of competent beneficiaries. *Gilchrist* v. *Stevenson*, 9 Barb. 9 (15); *Matter of Camp*, 126 N. Y. 377 (388 *et seq.*).

§ 258. **Continuing testator's business.**—As already seen, the creator of a trust may give to the trustees a wider field for investment than that otherwise prescribed by the law. He may thus authorize them to carry on a business with the funds of the estate. In so far as they thus act distinctively as trustees of a

separate trust fund, it would appear that their personal liability and that of the fund, under contracts entered into by them in the course of the business, would be regulated by the principles, already considered, governing the matter of any contract made by a trustee for the benefit of the estate. Thus, where a trustee is authorized by will to make a contract binding the estate, and does contract in that form, he is not personally liable. This principle has been applied to a trust to continue a business. *Noyes* v. *Turnbull*, 54 Hun, 26, aff'd 130 N. Y. 639. If one of several trustees in such a trust dies, resigns, or is removed, he ceases to be liable on future contracts made by the other trustees, for such trustees are not partners in any proper sense. Such is the rule, in any event, where the other party is put on notice that he has withdrawn. *Id.* Most frequently, however, the duty, or authority, to conduct a business is conferred on executors, in their capacity as such, or as donees of a power, and not distinctively as trustees. Such cases do not fall within the scope of the present discussion ; but for the light they may throw upon formal trusts for a similar purpose, the authorities are here collected. *Willis* v. *Sharp*, 113 N. Y. 586 ; *Willis* v. *Sharp*, 115 N. Y. 396 ; *Stewart* v. *Robinson*, 115 N. Y. 328 ; *Matter of Mullon*, 145 N. Y. 98 ; *Bell* v. *Hepworth*, 134 N. Y. 442 ; *Columbus Watch Co.* v. *Hodenpyl*, 135 N. Y. 430 ; *Matter of Jones*, 37 Hun, 430, aff'd 103 N. Y. 621 ; *Delaware, L. & W. R. R. Co.* v. *Gilbert*, 44 Hun, 201, aff'd 112 N. Y. 673 ; *Clapp* v. *Clapp*, 44 Hun, 451 ; *Johnson* v. *Lawrence*, 95 N. Y. 154 (163) ; *Matter of Bach*, 2 Con. 490 ; *Matter of Laney*, 50 Hun, 15 ; *Brennan* v. *Lane*, 4 Dem. 322 ; *Matter of Sharp*, 5 Dem. 516 ; *Gilles* v. *Stewart*, 2 Dem. 417 ; *Matter of Sands*, 1 Con. 259 ; *Boulle* v. *Tompkins*, 5 Redf. 472 ; *Matter of Prescott*, Tucker, 430 ; *Varnum* v. *Taylor*, 59 Hun, 554 ; *Nat. Bank of Newburgh* v. *Bigler*, 83 N. Y. 51 (57) ; notes in 21 Abb. N. C. 70 ; 17 Abb. N. C. 172 ; 9 Abb. N. C. 8 ; *Matter of Benedict*, 13 Abb. N. C. 67 ; *Estate of Leavitt*, 28 Abb. N. C. 457 ; *Sheldon* v. *Sheldon*, 84 Hun, 422.

Where C and H enter into a partnership agreement which authorizes the surviving partner to continue the partnership business for a fixed term of years after the death of either, the question whether this is in effect a testamentary provision with-

out the statutory formalities of execution, and so void ; and also whether its effect is to suspend unlawfully the alienability and absolute ownership of personal property of the estate thus tied up for that term in the business, were said, in *Bell* v. *Hepworth*, 134 N. Y. 442 (447) (citing *Nat. Bank of N.* v. *Bigler*, 83 N. Y. 51) to have been then open in the Court of Appeals. The court then proceed, in the *Bell* case, to state, first, that *if* the agreement was valid, its effect would be to leave in the business, during the term of years, the amount which the deceased member had in it at the time of his death ; that this would practically amount to a loan of that amount to the survivor, for that term, subject to the gain or loss of the business ; that the survivor would be the sole owner and manager of the business and property, and the decedent's estate would not, beyond the amount thus continued in the business, be liable for new debts ; that the estate would thus have an investment in the business, and, as in the case of other investments having a fixed term of years in which to mature, the executors could sell, or otherwise dispose of it, in the course of due administration, whenever opportunity offered. The *value* of the asset, but not its *disposability*, would be affected by the terms of its investment. Two features of this treatment of the question are to be noticed : First, that the court preface it by the statement that "it may be remarked," etc., treat it as a hypothetical case not necessarily before them, and go on to say that in the case in hand other considerations render the validity or invalidity of the contract unimportant ; and, secondly, that the remarks just summarized deal only with the question of suspension of ownership, and not at all with that relating to the invalidity of the agreement as being in effect a testamentary disposition not duly executed. The views expressed, however, as to suspension of ownership, though thus *obiter*, appear to be based on sound reasoning. A third point to be noticed is, that in the case in hand neither the agreement, nor the will, either authorized or directed the executors of decedent to take any part in the conduct of the business, or to represent his estate in carrying it on, nor had they done so, thus not raising the questions, similar to those stated, which would arise in a different and perhaps more perplexing form if such had been the facts. *Bell* v. *Hepworth*, 134 N. Y. 442. Compare *Stewart* v.

Robinson, 115 N. Y. 328, and other cases cited in the *Bell* case. Also *Matter of Laney*, 50 Hun, 15, aff'd 119 N. Y. 607.

The Trustee's Bond.

§ 259. **In the supreme court.**—The statutes do not require a trustee, appointed by the original trust instrument, to give a bond before entering on his duties. (But see Code C. P., § 2815.) Nor is a bond required by any statute, where a trustee is appointed by the Supreme Court.[1] But where there are infants, security is held to be indispensable, unless the clerk of the court is appointed, who has already given security as clerk. *Matter of Jones*, 4 Sandf. Ch. 615 (616). And in *Matter of Robinson*, 37 N. Y. 261 (264), it is said that security is always required on appointment of a trustee by the court. Also *People* v. *Norton*, 9 N. Y. 176; *Tompkins* v. *Moseman*, 5 Redf. 402 (405). But such requirement does not appear to be strictly essential. *Matter of Stuyvesant*, 3 Edw. Ch. 299; *Fellows* v. *Longyor*, 91 N. Y. 324 (bottom of p. 331); unless there are infant beneficiaries. *Matter of Jones*, 4 Sandf. Ch. 615. In the case, however, of certain assignments for the benefit of creditors, a bond is required by statute. Bishop on Insolvent Debtors (3d ed.), p. 408.

§ 260. **In the surrogate's court.**—The statute affecting testamentary trustees provides for security in cases where it might be required from one named as executor; Code C. P., §§ 2815, 2816; *Montfort* v. *Montfort*, 24 Hun, 120; and in no other cases, *Matter of Lawrence*, 6 Dem. 342; but these sections apply only to trustees named in the will, and not to those appointed by the court. *Matter of Whitehead*, 3 Dem. 227 (231–232). But § 2818, of the Code, authorizing the appointment by the surrogate of a successor to a testamentary trustee deceased, removed, etc., provides also that "where a decree *removing* a trustee or *discharging* him upon his resignation does not designate his successor, or the person designated does not *qualify*, the successor must be appointed and *must qualify* in the manner prescribed

[1] As to Trust Companies as trustees, however, see the Banking Law (L. 1892, chap. 689, Birdseye's R. S., pp. 229, 230).

by law for the appointment and qualification of an administrator with the will annexed." Though this portion of the section applies in terms only to cases of resignation or removal, it is settled that it must not be construed to relieve those appointed to fill vacancies caused by death or lunacy, from the necessity of giving security. *Matter of Whitehead*, 3 Dem. 227 ; *Tompkins* v. *Moseman*, 5 Redf. 402. This section also applies in terms only to the case where the appointment is not made by the same decree which creates the vacancy to be filled ; *Lane* v. *Lewis*, 4 Dem. 468 (472). But see *Matter of Whitehead*, *supra*. It was said in *Matter of Robinson*, 37 N. Y. 261 (264), that in such cases security is always in fact required ; but in the Surrogate's Court it has been held that it is not strictly essential, in such cases, to require security. *Lane* v. *Lewis*, 4 Dem. 468 (473). In *Tompkins* v. *Moseman*, 5 Redf. 402 (405), the following rule is laid down : " In looking into the course and practice of the late Court of Chancery, which had jurisdiction of all cases relating to trusts, it will be found that it was the practice to require a bond of a new trustee appointed in place of one who had died or been removed, and which practice is followed by the present Supreme Court in the exercise of equity powers ;" and it is held that the Surrogates' Courts should follow the same rule. To the same effect is *Matter of Whitehead*, 3 Dem. 227 (233).

§ 261. **Parties.**—Where a bond is required, it is discretionary with the court, to whom notice shall be given. *Tompkins* v. *Moseman*, 5 Redf. 402 (405) ; *Lane* v. *Lewis*, 4 Dem. 468 (472). But compare Real Prop. L., § 91.

§ 262. **Devastavit.**—Where trust funds have been wasted by the trustee, and the life beneficiary (a co-trustee) is also chargeable for the loss, the court, instead of requiring a deposit of an equal sum, may accept a bond secured by satisfactory mortgage, and bearing no interest, to insure the payment of the principal to the remaindermen on the death of the life beneficiary. The loss of interest constitutes a contribution of the life beneficiary to make good the loss. In the case cited the trustees seem to have held in their capacity as executors. *Earle* v. *Earle*, 93 N. Y. 104.

§ 263. **Sureties of testamentary trustees.**—Prior to the enactment of the Code of Civil Procedure, there were two modes of proceeding to enforce the liabilities of sureties of an executor or administrator: (1) Under 2 R. S. 116, § 19, providing that whenever an executor or administrator shall *refuse or omit* to perform any decree made against him by the surrogate, for rendering an account, or upon final settlement, or for the payment of a debt, etc., the surrogate might cause his bond to be prosecuted; this provision has been repealed; (2) Under L. 1837, ch. 460, §§ 63, 64, providing for the docketing of certificates of surrogates' decrees, and issuing an execution thereon (now §§ 2553, 2554, of the Code); and § 65, providing that on the return of the execution unsatisfied, the surrogate, on application, should assign the bond to the person in whose favor the decree was made, for the purpose of being prosecuted (now replaced by § 2607 of the Code, which differs somewhat in its terms). These two remedies were held to be cumulative and not inconsistent—under the former no execution being required, while under the latter, after return of execution unsatisfied, the bond was to be assigned, and prosecuted by the assignee. *Hood* v. *Hood*, 85 N. Y. 561 (572). But under both statutes a decree against the executor was a prerequisite to proceedings against the surety. Many of the earlier decisions relate to these statutes and are based on the distinctions mentioned.

§ 264. **Same—Present statutes.**—The present statutes provide, that after execution against the property of a *testamentary trustee*, executor, etc., has been returned wholly or partly unsatisfied, an action to recover the sum remaining uncollected may be maintained upon his official bond, by and in the name of the person in whose favor the decree was made. Code, § 2607. This section supersedes L. 1837, ch. 460, § 65, but does not require an assignment of the bond. There is no cumulative provision corresponding to 2 R. S. 116, § 19. *Hood* v. *Hayward*, 124 N. Y. 1 (9). The form of remedy and the procedure, after the trustee's death, has also been changed. § 2606 of the Code provides, that where a testamentary trustee dies, "the Surrogate's Court has the same jurisdiction, upon the petition of his successor, or of a surviving executor, administrator, or guardian,

or of a creditor, or person interested in the estate, or of a guardian's ward, to compel the executor or administrator of the decedent to account, which it would have against the decedent if his letters have been revoked by a surrogate's decree" (as to which, see Code C. P., § 2608–2609 ; *Long* v. *Long*, 142 N. Y. 545 ; *Hood* v. *Hayward*, 124 N. Y. 1 ; *Prentiss* v. *Weatherly*, 68 Hun, 114, aff'd 144 N. Y. 707). *Matter of Fithian*, 44 Hun, 457 ; *Perkins* v. *Stimmel*, 114 N. Y. 359. Such executor or administrator may also account voluntarily for any of the trust property which has come to his possession. Code C. P., § 2606. The same section then provides that : " With respect to the liability of the sureties in, and for the purpose of maintaining an action upon the decedent's official bond, a decree against his executor or administrator, rendered upon such an accounting has the same effect as if an execution issued upon a surrogate's decree against the property of decedent had been returned unsatisfied during decedent's lifetime." Under this provision, it is the decree of the surrogate on this accounting, and not the return of an execution unsatisfied, which establishes the devastavit of the original trustee and lays the basis for all action against the sureties, *Potter* v. *Ogden*, 136 N. Y. 384 (390) ; and as the section relates only to a rule of evidence as to proof of the *devastavit*, it applies though the bond was given before this section became a law. *Id.* Therefore, if a testamentary trustee is alive, a decree must be procured, and execution must be issued and returned unsatisfied, before suit can be brought on the bond ; but if he has died, before these steps are taken, a decree on accounting, against his personal representatives, showing a *devastavit*, and absence of assets, lays the basis for action on the bond. Upon this point compare § 2606, above quoted, with L. 1882, ch. 185 ; Real Prop. L., § 91.

§ 265. Remedy on the decree—On the bond.—When a decree is entered, and a transcript has been docketed (Code, § 2553), it becomes a lien on the trustee's real estate (Code, § 2553). It was held in 1878, in *Townsend* v. *Whitney*, 75 N. Y. 425 (for a change in the statute, see the end of this paragraph), that the docketing of the decree did not merge it ; the docket did not make it a judgment ; that before docketing, the persons in

whose favor it was rendered might, in various cases, enforce it against the trustee personally, in contempt proceedings, one of these cases being "where the delinquent is . . . a testamentary trustee, and the decree relates to the fund or estate . . ." (Code, § 2555); that after the decree was docketed, the persons in whose favor it was docketed had two remedies against the trustee or his property, to enforce payment; one by attachment in contempt proceedings, in the Surrogate's Court, and another by execution based on the docket; that the two remedies were not inconsistent, but concurrent, or cumulative, and they might both be pursued until the decree had been complied with; and that after execution had been returned unsatisfied, action lay on the bond, against the trustee and the sureties; and this, in turn, was not inconsistent with the continued right to proceed by attachment; even when judgment had been entered in an action on the bond, the right of execution thereon was also cumulative, and the parties entitled to payment were still entitled to pursue their remedies upon the decree as well as upon the judgment on the bond; and that even if the sureties, or one of them, effected payment of the judgment on the bond, this did not satisfy the decree, so far as concerned the rights of such surety, for on payment, he became subrogated to the rights of those whom he had paid, and if the judgments themselves were completely extinguished by the payment, as to which *quære*, he had the right to have the decree assigned, either to himself, or to some other person designated by him, and might enforce the same by attachment, in contempt proceedings against the trustee, either in his own name as assignee, or in the name of the original creditors. In regard to the foregoing principles as laid down in the *Whitney case*, it should be noticed, that at the time of that decision (1878) the Act of 1837, ch. 460, §§ 63, 64, as amended by L. 1844, ch. 104, § 2, was still in force, and provided that execution should be issued on the docketed certificate "in the same manner as though it was a judgment of the Court of Common Pleas." But two years later this law was repealed, and §§ 2553 and 2554 of the Code took its place, on this point, providing that "the docketing of such a decree has the same force and effect, the lien thereof may be suspended or discharged, and the decree may be assigned or satisfied, as if it was such a judgment;" and that a

decree directing the payment of a sum of money into court, or to one or more parties, may be enforced by execution against the property of the party directed to make the payment ; that execution shall be issued by the surrogate, or by the clerk of the Surrogate's Court, etc. As to these statutory provisions, see *Matter of Dunham*, 1 Con. 323 (329). The fact that a bond duly executed by sureties and delivered to the principal was never filed in court, is immaterial. *Haywood* v. *Townsend*, 4 App. Div. 246.

§ 266. **Sureties—Remedy against in equity.**—If the situation in a given case renders it possible to proceed in the Surrogate's Court to secure a decree, and in the proper case to issue execution, and then to bring action at law, against the sureties on the bond, these steps must be taken ; this principle applies to testamentary trustees, as well as to executors, over both of whom the surrogate has jurisdiction. No suit will lie, either at law or in equity, to charge the sureties, until the proper basis has been laid by such proceedings in the Surrogate's Court, and when they have been taken the action will be only at law. *Haight* v. *Brisbin*, 100 N. Y. 219. In cases not covered by the statutes, and where, accordingly, no steps can be taken in the Surrogate's Court to lay a basis for proceedings against the sureties, and wherever relief is called for and there is no remedy at law, a suit will lie in equity. In such case, instead of bringing an action at law on the bond, a suit should be brought in equity, setting up the facts establishing the specific need of the intervention of equity, and bringing all necessary parties before the court. *Haight* v. *Brisbin*, 100 N. Y. 219. It is believed that the foregoing statement of the form of action in equity, against the sureties of a testamentary trustee, applies only to cases where, from the nature of the particular case, no accounting can be procured, either in the Surrogate's Court or in equity ; if any case should arise, where, while no accounting was practicable in the Surrogate's Court under the statutes regulating its jurisdiction, an accounting might first be had in equity, it is believed that such accounting would still be regarded as a prerequisite, by analogy, *Long* v. *Long*, 142 N. Y. 545 (553), to an action on the bond, even in the case of a testamentary trustee ; for it is a general principle,

entirely apart from the Code provisions relating to testamentary trustees, and applicable generally to all trustees, that no action can be brought on a trustee's bond, to recover against the sureties, until a settlement of the trustee's account has been procured —except in certain cases where such a course is impracticable. And this is equally true though the bond contains no provision for an accounting before suit. *French* v. *Dauchy*, 134 N. Y. 543 ; *Hood* v. *Hood*, 85 N. Y. 561 ; *Long* v. *Long*, 142 N. Y. 545 (553) ; *Perkins* v. *Stimmel*, 114 N. Y. 359. But if, in the case of either testamentary or other trustees, the matter is not regulated by statute, and if an accounting either cannot be had, or, for special reasons, is utterly unnecessary and useless, it may be dispensed with. *Long* v. *Long*, 142 N. Y. 545 (553–554) ; *Douglass* v. *Ferris*, 138 N. Y. 192 (201) ; *Girvin* v. *Hickman*, 21 Hun, 316 ; *Haines* v. *Meyer*, 25 Hun, 414 ; *Williams* v. *Kiernan*, 25 Hun, 355 ; *Trust & Deposit Co.* v. *Pratt*, 25 Hun, 23. But where, as in the case of testamentary trustees, an accounting is by statute made a condition precedent to an action on the bond, the statute must control. *Long* v. *Long*, 142 N. Y. 545 (553).

§ 267. **Sureties are privies of trustee**, and, in the absence of fraud or collusion, are bound by valid decrees and orders made in a proceeding to which he is a party, by a court having jurisdiction over the administration of the estate, although they are not themselves parties, and have no notice ; (administrator) *Deobold* v. *Oppermann*, 111 N. Y. 531 ; (executor) *Scofield* v. *Churchill*, 72 N. Y. 565 (570) ; *Hood* v. *Hood*, 85 N. Y. 561 (579) ; (administrator) *Thayer* v. *Clark*, 4 Abb. Ct. App. Dec. 391 ; (adm'r c. t. a.) *Casoni* v. *Jerome*, 58 N. Y. 315 (322) ; (adm'r) *Gerould* v. *Wilson*, 81 N. Y. 573 (583) ; (adm'r) *Harrison* v. *Clark*, 87 N. Y. 572 ; (adm'r) *Johnston* v. *Smith*, 25 Hun, 171 ; (adm'r) *Kelly* v. *West*. 80 N. Y. 139 (146) ; (guardian) *Matter of Brown*, 72 Hun, 160 (164). The reason is, that their bond is conditioned on the trustee's obedience to the order of the court ; the justness and correctness of the order is immaterial. But if not thus conditioned, the rule is otherwise. See *Thomson* v. *MacGregor*, 81 N. Y. 592 (597) ; *Gerould* v. *Wilson*, 81 N. Y. 573 (584) ; *People ex rel. Collins* v. *Donohue*, 70

Hun, 317 (321). The decree may be impeached by the sureties for fraud or collusion in the procurement thereof. *Annett* v. *Terry*, 35 N. Y. 256 ; *Douglass* v. *Howland*, 24 Wend. 35 (55).

Trustees are estopped to deny the regularity of proceedings under which they secured possession of the trust property. *People* v. *Norton*, 9 N. Y. 176 (179) ; *Johnston* v. *Smith*, 25 Hun, 171 (177) ; *Dodge* v. *St. John*, 96 N. Y. 260. But if, in an action brought for the purpose, a general assignment is declared void, the assignee's sureties are not liable for the default of their principal to account. *People* v. *Chalmers*, 60 N. Y. 154, where the principle there applied is said not to apply to the liability of sureties of an administrator in case of revocation of letters ; but it would seem to apply to any case of express trust adjudged void *ab initio*. In determining the liability of sureties on a trustee's bond, substance is regarded, rather than form, and mere technical errors in the bond are no defence where the purpose and intended application are clear. (Adm'r) *Gerould* v. *Wilson*, 81 N. Y. 573. So with mere technical irregularities in other proceedings. *Harrison* v. *Clarke*, 20 Hun, 404. Sureties are liable for interest on the principal sum payable, from the date of the decree fixing the trustee's liability. *Hood* v. *Hayward*, 124 N. Y. 1 (21 *et seq.*, dissenting opinion, adopted on this point by the majority of the court, see top of p. 12). The death of a surety does not, it is said, relieve his estate of liability for the principal's after-management of the trust. See *Stevens* v. *Stevens*, 2 Dem. 469. Such death does not furnish a basis for an application by a party interested, that the trustee be required to give a new bond, or provide a new surety. *Id.* As to the requirements relating to "qualification" of the sureties on the bond of a testamentary trustee, see *Trask* v. *Annett*, 1 Dem. 171. As to amount of security, see *Senior* v. *Ackerman*, 2 Redf. 302. As to liability of sureties, to pay a fine imposed on the trustee for contempt, see *Loop* v. *Northup*, 59 Hun, 75. The right of the beneficiary to recover from the sureties may be lost by laches in proceeding against the trustee personally and by allowing claims to accumulate against him for many years without demand. *People ex rel. Collins* v. *Donohue*, 70 Hun, 317 (323). It is held in *Moss* v. *Cohen*, 16 Misc. 108, that the sureties on a bond given to induce the trustee to misappropriate the trust fund

are not liable, in a suit thereon by such trustee, Daly, Ch. J., dissenting.

§ 268. **Sureties—Default of trustee before bond given.**—Where there is a breach of trust before the bond is given, and the bond is conditioned for the faithful performance of duty and also for obedience to orders of the court, the sureties are liable, on the trustee's failure to obey an order directing the trustee to make good the antecedent default. (Executor) *Scofield* v. *Churchill*, 72 N. Y. 565 ; (special adm'r) *Gottsberger* v. *Taylor*, 19 N. Y. 150. The reason is, that the *order*, which is made after execution of the bond, is disobeyed, and thus the case is brought within the terms of the bond ; so that if a bond be confined to future breaches of trust, and omit reference to orders of court, sureties are not liable for the principal's failure to obey an order, directing him to make good a breach of trust occurring before the bond was given. (Receiver) *Thomson* v. *MacGregor*, 81 N. Y. 592. And knowledge on the part of plaintiff that a breach had been committed before the bond was given, and a concealment of that fact from the sureties when they went on the bond, would estop him from holding them liable for such breach. *Rothschild* v. *Frank*, 16 Misc. 621.

§ 269. **Sureties—Trust estate as collateral.**—It is contrary to the policy of the law for the trustee to pledge or transfer the trust assets to his sureties to secure them in case they are called on to respond for his default ; such a transaction is illegal, and gives the sureties no rights in such assets, as against the beneficiaries or the trustees. *Deobold* v. *Oppermann*, 111 N. Y. 531 (537) ; *Zimmerman* v. *Kinkle*, 108 N. Y. 282 ; *Fleet* v. *Simmons*, 3 Dem. 542. But sureties may thus acquire good legal title as against third parties, as for example, where the assets were notes, and the surety brought suit against the maker. *Rogers* v. *Squires*, 98 N. Y. 49. And under § 3320 of the Code, a trustee required by law to give a bond as such, may include as a part of his lawful expenses such reasonable sum, not exceeding one per cent. per annum upon the amount of such bond, paid his sureties thereon, as the court by which, or the judge by whom he is appointed, allows.

§ 270. **Sureties—When not fiduciary.**—Before an accounting, the position of a surety, it has been held, is not such as to interfere with his buying up claims the enforcement of which will diminish the trust funds. See *Halstead* v. *Hyman*, 3 Bradf. 426.

§ 271. **Sureties—Executor also trustee.**—Where the duties imposed on an executor, though they are outside of the mere settlement of the estate, and are of a trust character, are not intended to be regarded as separable and distinct, and the intent is that they shall be performed by him as executor, they fall within the scope of the executor's bond, and for their faithful performance his sureties are liable. *Cluff* v. *Day*, 124 N. Y. 195. When the intent is, that the executorial duties shall precede, and be closed, and the trust duties shall thereafter be performed in a distinct capacity as trustee, yet, until the trust has by decree been thus severed, and the executor relieved and discharged, as such, from further liability for the trust fund, the sureties on the executor's bond remain liable for his faithful performance of all duties. *Id.* *Potter* v. *Ogden*, 136 N. Y. 384 (391). But when, in such case, a severance has been effected, and the executor, as such, no longer holds the trust funds, it seems that the sureties on his bond as executor are no longer liable for his acts in relation to the trust. *Id.* On the foregoing statements, see also *Hood* v. *Hood*, 85 N. Y. 561 ; s. c. 98 N. Y. 363 ; 104 N. Y. 103.

§ 272. **Sureties—Release of one.**—All the parties interested may, by the use of appropriate terms, effect a release of one surety, and yet hold the other liable, but only to the extent to which his *pro rata* liability would have existed, under the doctrine of contribution, if no release had been executed. *Hood* v. *Hayward*, 124 N. Y. 1 (12 *et seq.*, dissenting opinion, adopted on this point by the majority of the court, see top of p. 12). As to the effect of suing both sureties and entering judgment against one only, compare *Waggoner* v. *Walrath*, 24 Hun, 443, aff'd 92 N. Y. 639.

§ 273. **Sureties—Release by surrogate.**—Sureties of testamentary trustees may be released by the Surrogate's Court, on

their petition, from responsibility for future breaches of the condition of the bond. The necessary proceedings are set forth in §§ 2600, 2601 of the Code. *Shook* v. *Goddard*, 2 Dem. 201 ; *Bick* v. *Murphy*, 2 Dem. 251 ; *Lewis* v. *Watson*, 3 Redf. 43.

§ 274. **Beneficiary as surety.**—Where it appears, on an accounting by a testamentary trustee, that a certain distributive share of the fund is payable to a person who is in fact a surety on the bond of such trustee's predecessor, the surrogate has no authority to direct the trustee to hold back such distributive share until the liability of such surety has been ascertained. *Matter of Horn*, 7 App. Div. 89.

Acts of Co-trustees.

§ 275. **Analogous to co-executors.**—In view of the numerous decisions concerning the responsibility of an executor for the acts of his co-executor, it is important to establish the exact relation they bear as authorities upon the responsibility of a technical trustee for the acts of his co-trustee. The subject was briefly discussed in *Ormiston* v. *Olcott*, 84 N. Y. 339 (346), where it is said that " it is not disputed that the rule applicable to executors, as such, is that each is liable only for his own acts, and one cannot be made responsible for the negligence or waste of another, *unless he in some manner aided or concurred therein*. . . . [Citing authorities.] It is claimed, however, that the rule is more stringent where executors are also trustees. . . . The authorities in this State do not justify the distinction sought to be made. . . . [Citing authorities.] There would be neither wisdom nor justice in a rule which would practically end in making a trustee a guarantor of the diligence and good faith of his associates, and hold him responsible for acts which he did not commit and could not prevent." To the same effect are the decisions in *Banks* v. *Wilkes*, 3 Sandf. Ch. 99 ; *Kirby* v. *Turner*, Hopk. Ch. 309 (330) ; *Kip's adm'rs* v. *Deniston*, 4 Johns. 24, in which the trustees were such only, and not also executors. " We have lately held that one executor (and I think the rule is the same with other trustees) is responsible for his own acts and not for those of his associate," etc. *Bruen* v. *Gillet*, 115 N. Y. 10 (14). Under these and other authorities, therefore, the cases

relating to executors may here be cited in reference to trustees.[1]

§ 276. **General rule.**—Each trustee is liable only for his own acts, and is not responsible for the negligence or waste of a co-trustee. *Ormiston* v. *Olcott*, 84 N. Y. 339 (346); *Nanz* v. *Oakley*, 120 N. Y. 84 (88–89); *Wilmerding* v. *McKesson*, 103 N. Y. 329; *Cocks* v. *Haviland*, 124 N. Y. 426; *Taylor* v. *Shuit* 4 Dem. 528.

§ 277. **Rule explained.**—The statement in the rule, that "a trustee is liable only for *his own acts*," calls, however, for careful examination. "Where one executor or trustee *receives* the funds of the estate, and either *delivers them over* to his associate or *does any act* by which the funds come under the sole possession and control of the latter, and *but for which* he would not have received them, the executor or trustee is liable for the loss sustained in consequence of such action" (if the same was unnecessary). *Bruen* v. *Gillet*, 115 N. Y. 10 (14); *Croft* v. *Williams*, 88 N. Y. 384 (387); *Adair* v. *Brimmer*, 74 N. Y. 539 (561); *Thompson* v. *Hicks*, 1 App. Div. 275; *Matter of Litzenberger*, 85 Hun, 512; *Clark* v. *Clark*, 8 Pai. 152 (160); *Sutherland* v. *Brush*, 7 Johns. Ch. 17 (23); *Matter of Storm*, 28 Hun, 499; *Dixon* v. *Storm*, 5 Redf. 419; *Wyckoff* v. *Van Siclen*, 3 Dem. 75. And he does thus "receive and deliver over," in the sense of the foregoing rule, if the funds are deposited to joint account and then drawn by the co-trustee on a check signed by both, where there is no necessity for drawing, *Bruen* v. *Gillet*, 115 N. Y. 10 (16). But compare *Purdy* v. *Lynch*, 145 N. Y. 462. But where, on testator's death, the securities in question were in his house, and upon the appraisal his widow, an executrix and trustee, produced them, and after the appraisal the other executor took them away, and misappropriated them, it was held that they were never in her custody as executrix and

[1] But the fact that each executor by himself has powers which as among trustees must be exercised jointly, may often introduce a distinction, when the question is whether a given trustee did or did not constructively participate in the wrongdoing of another, as where he joined, of necessity, in some act which resulted in bringing assets into the sole custody of his associate.

trustee, and were never delivered by her to her co-trustee, in such a sense as to render her liable for his wrongdoing. *Wright* v. *Dugan*, 15 Abb. N. C. 107 (118–119). And if a trustee, to avoid expensive litigation, personally redeems securities thus wrongfully pledged by his co-trustee, without his co-operation, he may, if his course was reasonably prudent, and he acted in good faith, be credited with the advance on his accounting. *Id.*, p. 120. Where trustees do a purely formal act in which both must join in order to effectuate the purposes of the trust, and the result is to bring trust money into the hands of one, this is not a receipt by one, and a delivery over to the other, such as to render the one who never in fact had the money liable for the acts of the one who did. The former was essentially passive. Thus, where trustees have a power of sale of land, it is necessary that both should join in executing it. If on delivery of the deed the consideration is paid to one, these facts alone do not render the other liable. *Croft* v.. *Williams*, 88 N. Y. 384 (390); *Kip's Adm'rs* v. *Deniston*, 4 Johns. 24 (26). So one trustee is not liable for waste of a fund turned over to his co-trustee under a decree of a competent court. *Cline* v. *Sherman*, 144 N. Y. 601. So, if a check for the purchase price is, in such a case, given to one trustee, and he merely endorses it over to another, who cashes it and misappropriates the proceeds, the former is not liable, as his act was a formal one necessary for the purpose of obtaining possession of the purchase money from the purchaser. *Paulding* v. *Sharkey*, 88 N. Y. 432. So where there are very numerous claims to be paid from a fund deposited in the joint names, and all unite from time to time in drawing and turning over to one trustee, who took charge of the payments, sums reasonably and necessarily called for at that time for actual or contingent payments. *Purdy* v. *Lynch*, 145 N. Y. 462. So, where trustees join in signing a receipt, while this is *prima facie* evidence that both received the money, *Monell* v. *Monell*, 5 Johns. Ch. 283 (294 *et seq.*); *Manahan* v. *Gibbons*, 19 Johns. 427 (440), yet the presumption may be rebutted, *Paulding* v. *Sharkey*, 88 N. Y. 432; see *Bruen* v. *Gillet*, 115 N. Y. 10 (16). But it has been held, that if stock stands in the name of two trustees, A and B, and both unite in executing a power to C, a third party, to effect a transfer to a purchaser, and the pro-

ceeds thereby come into the hands of B, A is liable for misappropriation by B. *Spencer* v. *Spencer*, 11 Pai. Ch. 299 (305–308). But if all the trustees unite in rendering a joint account, by which it appears that the property was received by them all, this is an admission of joint action and joint liability ; *Glacius* v. *Fogel*, 88 N. Y. 434 (442–444) ; *Davis* v. *Kerr*, 3 App. Div. 322 (327, 329) ; *Lacey* v. *Davis*, 4 Redf. 402 ; but such a conclusion may be rebutted. *Taylor* v. *Shuit*, 4 Dem. 528 (530) ; *Lacey* v. *Davis*, 5 Redf. 301. But if the account shows, and the decree determines that a certain fund is in the hands of one of the trustees, this does not determine that it got there properly. The beneficiary may still show that the other trustees had been negligent in paying it over to him. *Thompson* v. *Hicks*, 1 App. Div. 275. And " the *mere* fact that one of two or more executors or trustees is *passive* and does not interfere with the act of his co-executors in taking possession of the property and collecting moneys of the estate, will not charge him with liability for waste by them." *Cocks* v. *Haviland*, 124 N. Y. 426 ; (and also on same facts, *Matter of Cocks*, 1 Con. 347, and *Cocks* v. *Barlow*, 5 Redf. 406) ; *Croft* v. *Williams*, 88 N. Y. 384 (388) ; *Wilmerding* v. *McKesson*, 103 N. Y. 329 (339–340) ; *Adair* v. *Brimmer*, 74 N. Y. 539 (567) ; *Banks* v. *Wilkes*, 3 Sandf. Ch. 99 ; *Kirby* v. *Turner*, Hopk. Ch. 309 ; *Sutherland* v. *Brush*, 7 Johns. Ch. 17 (22) ; *Matter of Cozzens*, 2 Con. 622 ; *Matter of Hall*, 5 Dem. 42 ; *Lacey* v. *Davis*, 5 Redf. 301. This principle applies where A and B, as executors, hold assets of the estate, deliverable to an infant beneficiary of whom they and C are also guardians, and where they turn them over to C alone, as guardian ; *as guardians*, A and B have never had possession ; C, *as guardian*, was the only guardian who had them in his custody ; it was proper for the executors to pay to one guardian, so that A and B are not liable *as executors* for the default of C ; (to the same effect is *Paulding* v. *Marvin*, reported in note, 3 Redf. p. 365) ; nor are they liable *as guardians*, for as such they never had possession and were merely passive. *Kirby* v. *Turner*, Hopk. Ch. 309 (330). Nor is this result changed by the fact that all three guardians gave a bond in the usual form, with a condition that they should in all things faithfully discharge the duty of guardians according to law. The bond did

not vary their obligations. Their rights and duties are defined by law, and their duties were the same after the bond had been given as they would have been had no bond existed. Though the bond is joint and several, it only renders them jointly liable for joint acts, and severally for their several acts, but what acts are joint, and what several, are matters determined by principles of law and not by the bond. *Kirby* v. *Turner*, Hopk. Ch. 309 (331 *et seq.*). To a similar effect is *Nanz* v. *Oakley*, 120 N. Y. 84, where A and B were administrators of an intestate of whom A was sole next of kin. They joined in the required administrator's bond, and C also executed it as surety. On the default of B, without any participation by A, it was held that an action would lie on behalf of the assignee of A's individual interest, against C. The fact that A was on the bond did not stand in the way of his holding C liable for the sole default of A's co-administrator. So also, a trustee may, suing as such, and on behalf of the trust estate, recover from the sureties on a bond given by himself and a co-trustee, for the default of the co-trustee. *Sperb* v. *McCoun*, 110 N. Y. 605 (610); *Boyle* v. *St. John*, 28 Hun, 454. *Sperb* v. *McCoun*, *supra*, decided in 1888, left open the question of the right of a trustee personally entitled to the funds misappropriated, to sue the sureties on his and his co-trustee's bond, for the default of the latter, but as above stated, this was settled in 1890, in *Nanz* v. *Oakley*, *supra*. This distinction, however, between affirmative acts, such as receiving and then paying over to the associate—which render him liable for the acts of the latter; and the mere fact of being passive, as where he simply does not interfere when his associate originally receives property or collects money from others, and does not insist on having it placed under joint custody—in which case he is not liable for the acts of the co-trustee; this distinction calls for qualification. For there are circumstances under which he may be passive, and yet become liable. Thus:

§ 278. **Liable though passive.**—The freedom of a trustee from liability for the acts of his associate, where the former is merely passive in allowing him to get in and hold the trust estate, is subject to this qualification; that if he has any reason to apprehend that his associate may be guilty of negligence or waste

if allowed to receive or hold the property, or if, when the latter has received it, he might, by the exercise of proper care have prevented misapplication known to him to be intended or in progress, then he is liable. For in such a case he is in reality something other than passive. His own negligence, or wilful disregard of duty, becomes an element in his conduct. *Davis* v. *Kerr*, 3 App. Div. 322 (328); *Earle* v. *Earle*, 93 N. Y. 104 (113).

§ 279. **What constitutes negligence.**—The mere poverty of the co-trustee does not *per se* charge the trustee with notice of any probable wrongdoing. "He [the co-trustee] was poor, and hampered by lack of means, and Croft [the trustee] undoubtedly knew and realized the fact; but that is not enough. It does not follow that because a man is poor and needs money that he will, therefore, embezzle trust funds or steal an orphan's inheritance. Honest poverty is quite as worthy of trust as honest wealth. The testator selects his executors for himself, and where he has placed his confidence, even if the chosen trustee be poor or insolvent, it is not for the associate executors to withhold theirs, the situation being unchanged, unless some misapplication is threatened or manifest." *Croft* v. *Williams*, 88 N. Y. 384 (389). But where a co-trustee invests moneys realized from the estate, in his own business, with the knowledge of the trustee, in hostility to the terms of the will relating to investment, his associate is liable for loss; even if he had had no actual knowledge that the firm was using the funds, he was chargeable with negligence in failing to find out, as the facts he did know put him on notice. *Wilmerding* v. *McKesson*, 103 N. Y. 329 (337). The mere omission of a trustee to see that the co-trustee who holds the funds has invested them properly, does not, *per se*, subject him to liability. "The rule of liability does not go so far as to charge an executor having none of the funds of an estate in his possession or under his control, with the consequences of the neglect or failure of his co-executor to make the disposition by investment or otherwise of the subject of the trust pursuant to the direction of a will where the latter has the entire fund in his hands and assumes its management, *unless there is some reason to suspect that he has or may* fail to execute the will in that re-

spect." *Cocks* v. *Haviland*, 124 N. Y. 426 (431). But there is one difficult question which now and then appears on the surface, where a trustee has apparently been merely passive, and yet is held responsible for the default of a co-trustee, because negligent in that he would have discovered the wrongdoing if he had himself used due care, made proper inquiries, etc. Thus, "mere passiveness will not furnish an adequate excuse, or any ground for relief in equity for the consequences of administrative acts by her co-administrator. She could not rely on him to manage affairs and then claim to have been relieved from the performance of her legal duty. . . . Mrs. Miller was *bound to inform herself* with respect to the affairs of the estate," etc. But in fact in that case, the plaintiff beneficiary was the same person who, as trustee, remained passive, and then tried to hold her co-trustee accountable. *Matter of Niles*, 113 N. Y. 547. But the same principle has been applied where that feature did not exist. *Matter of Myers*, 131 N. Y. 409 (420). Compare *Matter of Cozzens*, 2 Con. 622 (627). For further cases of negligence, see *Whitney* v. *Phœnix*, 4 Redf. 180; *Matter of Macdonald*, 4 Redf. 321; *Lacey* v. *Davis*, 4 Redf. 402; s. c. 5 Redf. 301; *Wise* v. *Murphy*, 5 Redf. 365.

§ 280. **Waiver of liability.**—A beneficiary in some cases, where he has known of the negligence or improper conduct of a trustee, and has acquiesced therein, may be estopped from thereafter holding the co-trustee liable for the results, where the latter did not actively participate in the wrongful acts. *Sherman* v. *Parish*, 53 N. Y. 483 (492); *Earle* v. *Earle*, 93 N. Y. 104 (117). See also *ante*, §§ 256, 279.

§ 281. **Trustee's agent.**—The foregoing principles apply to cases where only the co-trustees were to be considered. But if a third person, not a trustee, be entrusted by them with property of the estate, they may become responsible for his wrongful acts, for he is their agent. *Earle* v. *Earle*, 93 N. Y. 104 (112); *Adair* v. *Brimmer*, 74 N. Y. 539 (564). On the subject of a trustee's liability for the default of an agent employed in good faith, and entrusted with securities, under circumstances raising no cause for suspicion, compare *McCabe* v. *Fowler*, 84 N. Y.

314; *Matter of Schott*, Tucker, 337; *Adair* v. *Brimmer*, 74 N. Y. 539 (554); *Matter of Niles*, 113 N. Y. 547. *Ante*, §§ 246, 247. As to waiver, acquiescence and ratification, see *ante*, §§ 256, 279, 280.

§ 282. **Notice to one affects both.**—If property be transferred by one trustee who knows that he has no title, to the other who has no personal knowledge, as security for a loan from the estate to the former, the knowledge of the transferrer will be imputed to the transferree, so that the real owner may recover from the latter even though, in absence of such notice, he could not recover. *Troy & A. H. R. Co.* v. *Smith*, 11 N. Y. Supp. 261; s. c. 33 State Rep. 203. But where this same transaction subsequently came before the Surrogate's Court, on an accounting of the trustees, the trustee who loaned the money and took the note was held personally liable, because he actively participated in the appropriation of the fund by the co-trustee to his personal use. *Matter of Cozzens*, 2 Con. 622. And compare *Roosevelt* v. *Land & River Imp. Co.*, 11 Misc. 595, aff'd 38 N. Y. Supp. 242.

§ 283. **Usury taken by one.**—If one trustee loans trust funds on mortgage, and receives a usurious bonus, this does not prevent foreclosure, if the other trustee did not participate in taking usury. *Van Wyck* v. *Walters*, 16 Hun, 209 (aff'd *sub nom. Van Wyck* v. *Watters*, 81 N. Y. 352, where it was held that none of the trustees knew of the usurious bonus, which was taken and retained by their agent); *Stout* v. *Rider*, 12 Hun, 574. And even if a sole trustee, or all of several trustees, should make a usurious loan of funds known to the borrower to be trust funds, and there is no agreement as to the usurious payment with the beneficiary, the result is the same. *Fellows* v. *Longyor*, 91 N. Y. 324. And the words "trustee," "executor," "guardian," etc., in the securities given, show that the borrower had notice of the rights of the beneficiaries, and the nature of the fund loaned. *Pendleton* v. *Fay*, 2 Pai. 202; *Budd* v. *Munroe*, 18 Hun, 316; *Duncan* v. *Jaudon*, 15 Wall. 165; *Swan* v. *Produce Bank*, 24 Hun, 277; *Gerard* v. *McCormick*, 130 N. Y. 261 (267); *Fellows* v. *Longyor*, 91 N. Y. 324 (331) and cases

there cited. And if one trustee assents to a loan from the estate to a co-trustee, on a mortgage, which provides for a rate of interest allowed by law at the execution thereof, but exceeding the legal rate subsequently established by law, he may be held liable to the extent of the agreed rate, for failure to collect the interest, although if the application were based on his misconduct in assenting at all to a loan to a co-trustee, it seems that he would not be held liable for more than legal interest. *Matter of Rutherford*, 5 Dem. 499 (507). As to usury taken by an agent, see *ante*, §§ 247, 281.

§ 284. **Trustees as defendants.**—An action in equity based on a breach of trust will lie against a trustee and the representatives of a co-trustee who has died since the breach charged, as joint defendants. *Sortore* v. *Scott*, 6 Lans. 271 (276). And such an action, brought against a surviving trustee only, is defective for lack of parties, if defendant, though responsible to the plaintiff for the wrongful act of the deceased trustee, is entitled to any remedy over against the representatives of the latter, or if, as trustee, he is entitled to recover from such representatives for the benefit of the estate. *Sherman* v. *Parish*, 53 N. Y. 483. Compare *Gilchrist* v. *Stevenson*, 9 Barb. R. 9 (16).

§ 285. **Liability for taxes.**—Where one trustee had sole custody and control of personal property, the co-trustee was not taxable, under 1 R. S. 389, merely because he too had *title*. *People ex rel. Caswell* v. *Comm'r of Taxes*, 17 Hun, 293. See *ante*, § 164; *People ex rel. Campbell* v. *Comm'rs of Taxes*, 38 Hun, 536. Compare the provisions of the Tax Law (L. 1896, Chap. 908), §§ 8, 32.

§ 286. **Admissions of Trustee**, as to his wrongful acts, if made so as to constitute a part of the *res gestæ*, may, it has been said, be admitted in evidence in favor of the co-trustee, against the beneficiary, in a suit in equity for an accounting. *Wright* v. *Dugan*, 15 Abb. N. C. 107 (121); compare *Elwood* v. *Deifendorf*, 5 Barb. R. 398 (407); *Finnern* v. *Hinz*, 38 Hun, 465.

§ 287. **Suit by one.**—Where there is pressing need to bring suit, on behalf of the estate, as, to enforce a lien, and one or

more of the trustees will not join, the other or others may bring the suit. *Bockes* v. *Hathorn*, 78 N. Y. 222 (226); and in such a case, the sole plaintiff may throughout act independently, even in taking an appeal, without renewing his request to the others to join. *Id.* As to his right to appeal alone, if the others had joined with him as plaintiffs, but refuse to join in appealing, *quære*. *Id.*, pp. 225–226.

§ 288. **Default of one.**—If one trustee is served with original process and fails to appear, and the cause, after appeal, is remitted for further hearing, he cannot then relitigate a question affecting the estate and already finally decided against his co-trustee on the appeal. *Clayton* v. *Wardell*, 2 Bradf. 1 (5–7).

§ 289. **Trustee suing Co-trustee.**—One trustee may sue another to prevent a wasting of the estate. *Bockes* v. *Hathorn*, 78 N. Y. 222 (226); *Wurts* v. *Jenkins*, 11 Barb. R. 546. As to the exclusive jurisdiction in equity to entertain a suit by one trustee against another to recover an indebtedness of the latter to the trust estate, see the cases relating to co-executors. *Rogers* v. *Rogers*, 75 Hun, 133; *McGregor* v. *McGregor*, 35 N. Y. 218; *Smith* v. *Lawrence*, 11 Pai. Ch. 206; *Decker & Tyson* v. *Miller*, 2 Pai. Ch. 150; *Wurts* v. *Jenkins*, 11 Barb. R. 546.

§ 290. **Agreement that one shall control.**—The question of whether an agreement between trustees that one of them shall retain control is unlawful, is referred to, but not passed on, in *Corn* v. *Corn*, 4 Dem. 394 (398). It is clear that as against the beneficiary the agreement itself could have no binding effect to relieve either from a liability which would otherwise exist. *Hayes* v. *Pratt*, 147 U. S. 557.

§ 291. **Security by insolvent.**—In cases where one of several testamentary trustees might be required by the surrogate to give security for faithful performance of duty, on the ground of insolvency, he cannot be relieved from doing so by showing that a co-trustee is solvent and responsible. *Matter of Sears*, 5 Dem. 497.

§ 292. **Right to retain counsel.**—As a general proposition,

one of several trustees has as much right as the others to retain counsel to represent the estate in litigation ; and if one does so, it is generally inappropriate for the others to retain other counsel in the same work, and the charges of the latter will not be allowed on accounting. But there are exceptions to this rule. *Matter of Delaplaine*, 19 Abb. N. C. 413 (420), aff'd 45 Hun, 225 ; *Matter of Delaplaine*, 1 Con. 1 ; *Matter of Weeks*, 5 Dem. 194.

Costs and Security.

§ 293. **Costs in actions.**—"In an action, brought *by or against* an executor or administrator, in his representative capacity, or the *trustee of an express trust*, or a person expressly authorized by statute to sue or to be sued, costs must be awarded, as in an action by or against a person, prosecuting or defending in his own right, except as otherwise prescribed in sections one thousand eight hundred and thirty-five and one thousand eight hundred and thirty-six of this act ; *but they are exclusively chargeable upon, and collectible from the estate, fund, or person represented*, unless the court directs them to be paid, by the *party personally*, for *mismanagement* or *bad faith* in the prosecution or defence of the action." Code C. P., § 3246. The §§ 1835, 1836, above referred to, relate to actions against executors and administrators in their representative capacity. For the general rule regulating costs in special proceedings, see *post*, § 294.

Where a trustee's action for construction of the trust instrument is frivolous, or in bad faith, *Powell* v. *Demming*, 22 Hun, 235, or baseless and unnecessary because the questions are pending before another court having jurisdiction, *Garlock* v. *Vandevort*, 128 N. Y. 374 (379), or is intended to delay payment to persons clearly entitled, *Smith* v. *Rockefeller*, 3 Hun, 295, costs may be imposed on him personally. So where, pending a suit brought by him as trustee, he voluntarily disburses trust funds, and thus leaves the estate without means to pay a judgment for costs, it has been held that he may be charged with them personally. *Butler* v. *B. & A. R. R. Co.*, 24 Hun, 99. But in a similar case, where a trustee claimed the amount sued for by plaintiff, and was by interpleader made defendant, and judgment for costs was finally entered against him as trustee, and it appeared that

pending the suit he had voluntarily disbursed the funds, a motion to charge him personally was denied, and the case last cited was criticised and not followed, on the ground that such an act does not show "mismanagement or bad faith in the *prosecution or defence of the action.*" *Jack* v. *Robie*, 48 Hun, 181. A trustee is personally chargeable with costs where he brings a suit concerning a subject-matter with which he has no concern. *Dill* v. *Wisner*, 23 Hun, 123 (see on appeal, 88 N. Y. 153). So, where he prosecutes an unsuccessful appeal to relieve himself of personal liability, *Pittman* v. *Johnson*, 35 Hun, 38 (42), aff'd 102 N. Y. 742; or takes an appeal without merits, *Matter of McCarter*, 94 N. Y. 558 (562). For other illustrations, see *Matter of Schneider*, 1 App. Div. 39. And where he might sue individually, the fact that he does sue in a representative capacity does not relieve him of personal liability. *Bedell* v. *Barnes*, 29 Hun, 589; *Buckland* v. *Gallup*, 105 N. Y. 453; *Bostwick* v. *Brown*, 15 Hun, 308; *Holdrige* v. *Scott*, 1 Lans. 303. Where he must sue as trustee the statute applies. *Hone* v. *DePeyster*, 106 N. Y. 645. In such a case, and where costs are to be charged personally, a special direction by the court to that effect is required, and a mere dismissal of the complaint, upon the plaintiff trustee's failure to appear, does not carry with it such a legal implication of mismanagement or bad faith as will charge him personally with costs. And to secure an order so charging him, there should be a specific application, on notice, in order to allow him to repel the charge of mismanagement or bad faith. *Slocum* v. *Barry*, 38 N. Y. 46.

If a trustee sues *as such*, and is defeated, and there is no direction charging him personally with costs, defendant may not enter judgment and issue execution against him personally for the costs. Plaintiff is only liable to the extent of the trust fund. *Alger* v. *Conger*, 17 Hun, 45, aff'd 79 N. Y. 633. Where the question is whether a trustee is liable as such, or personally, for costs, the judgment to that effect is final unless subsequently reversed or set aside by a direct proceeding for that purpose, and it cannot be attacked collaterally, as by a petition to charge the costs otherwise than as directed in the judgment. *Hone* v. *DePeyster*, 106 N. Y. 645. The case of *Slocum* v. *Barry*, 38 N. Y. 46, is not inconsistent with this principle, for there the

trustee failed to appear at the trial "and judgment was entered on default, without a trial, hearing or investigation on the merits. The court consequently was not and could not be possessed of the facts upon which the claim of mismanagement or bad faith was founded, and under these circumstances the court was of the opinion that a motion was necessary. This is not disputed in the case of *Hone* v. *DePeyster*, 106 N. Y. 645, where there *was* a trial. "That case merely holds that it was the duty of the trial court [where a trial takes place] to determine the question." *Jack* v. *Robie*, 48 Hun, 181. See *Weekes* v. *Garvey*, 4 N. Y. Supp. 891. The question of charging the trustee as such, or personally, with costs, may be reviewed by the Appellate Division, but with its discretion, in an equitable action, the Court of Appeals will not, as a rule, interfere. *Dill* v. *Wisner*, 88 N. Y. 153 (162); *Herrington* v. *Robertson*, 71 N. Y. 280 (284). Compare *Brundage* v. *Brundage*, 60 N. Y. 544 (552).

The foregoing authorities relate to the question of whether the charge of costs is to be against the trustee personally or as trustee. But this differs from the question whether, on his accounting as trustee he shall be allowed to credit himself with such payment as against the estate. As between the parties to the action, the judgment is conclusive according to the authorities above cited. "But that principle decided nothing in regard to this assignee's liability to those for whom he is trustee. They were not parties to the judgment against him, and are not bound by its terms." They had no opportunity to show that he was personally liable, and, if the estate was solvent, the adverse party in the action was not interested to do so. "But now the persons interested in the estate are heard for the first time. They have a right to charge that the assignee was guilty of misconduct." *Matter of Felt & Bell*, 52 Hun, 60; *Tucker* v. *McDermott*, 2 Redf. 312. So conversely it has been held that if, in a suit brought against a trustee individually, on a personal contract made by him for the benefit of the estate, but where he was liable only individually because he had not by special contract charged the estate, judgment for costs is entered against him individually, he may on his accounting credit himself with the payment, provided it is not then shown affirmatively that he showed mismanagement or bad faith. *Matter of Grout*, 15

Hun, 361. Where costs are allowed to a trustee, who appears personally, to be paid by the adverse party, he is entitled to retain them ; so, if he retains an attorney, the costs allowed to him belong to the attorney, as at least a part of his compensation, and it is said that if he chooses to give part of them to the trustee he may do so ; the circumstance is suspicious, but in the absence of facts showing that the trustee had employed an incompetent attorney, to enable him to effect such an arrangement, or had otherwise prejudiced the interests of the estate to forward his own, the beneficiaries cannot object. The costs have not come out of their pockets. *Clute* v. *Gould*, 28 Hun, 348. It would seem, however, that such a transaction ought to put the trustee to his proof to remove the suspicion.

If costs are ordered paid from a fund in the hands of a trustee, only part of which belongs to the trust, the trust fund is only to be charged with its proportionate share. *McKee* v. *Weeden*, 1 App. Div. 583.

§ 294. **Costs—Special proceedings.**—" Costs in a special proceeding, instituted in a court of record, or upon an appeal in a special proceeding, taken to a court of record, where the costs thereof are not specially regulated in this act, may be awarded to any party, in the discretion of the court, at the rate allowed for similar services, in an action brought in the same court, or an appeal from a judgment taken to the same court, and in like manner." Code C. P., § 3240.

Extra allowances are made in actions only—not in special proceedings. But where in a special proceeding a trustee is a party, the court has inherent right to allow his expenses including counsel fees, though not " as costs," but not the counsel fees or other expenses of other parties. A guardian representing infants having only a contingent or reversionary interest in the fund, cannot be allowed even any of his expenses, in a special proceeding. *Matter of Holden*, 126 N. Y. 589. In the Chapter on Surrogates' Courts, the Code provides (§ 2557) that " except where special provision is otherwise made by law, costs, awarded by a decree, may be made payable by the party personally, or out of the estate, or fund, as justice requires ; . . ." Under this section, the principle regulating a review by the Appellate Division

of a decision below, in respect to its effect in charging a trustee as such or personally with costs, does not apply. The subject is, under § 2557 of the Code, left to the discretion of the surrogate, and his decision cannot be reversed even by the Appellate Division, except for abuse of discretion. *Matter of Selleck*, 111 N. Y. 284 (290); *Matter of Marvin*, 11 Abb. Pr. (N. S.) 97, 101. The costs on appeal are determined by the Appellate Court. *Lawrence* v. *Lindsey*, 70 N. Y. 566.[1]

§ 295. **Security for Costs.**—"In an action brought *by* or *against* an executor or administrator, in his representative capacity, or the trustee of an express trust, . . . the court may, in its discretion, require the plaintiff to give security for costs." Code C. P., § 3271. This section just quoted, and § 3246, quoted *ante*, § 293, are entirely independent. Section 3246 relates to the *awarding* and enforcement of the *payment* of costs, and § 3271 to *security for costs*. The two are not to be construed together. On an application under § 3271 to require plaintiff, a trustee, to give security for costs, the fact that he could not, under § 3246, and on the facts shown, be personally charged with costs, has no bearing. Even though not personally chargeable, it may be proper for him, as plaintiff, to give security. Decisions to the contrary are overruled. *Tolman* v. *S. B. & N. Y. R. R. Co.*, 92 N. Y. 353. In suits by or against an executor, it has been held that this section only applies where he was an original party, and not to cases where he later became a party in a suit revived after the death of his testator. *Sullivan* v. *Remington S. M. Co.*, 27 Hun, 270. But even in such a case, the court has, apart from the statute, inherent power to require security for costs, *e.g.*, as a condition of allowing an action to be continued against the executor of the original defendant. *Knoch* v. *Funke*, 28 Abb.

[1] As to costs in the Surrogate's Court, see (1) when a matter of right, Code C. P., § 2558; (2) as to amount, Code C. P., §§ 2559, 2561; (3) allowance on accounting for counsel fees, etc., Code C. P., § 2562; (4) costs on proceeding to compel trustee to renew bond, Code C. P., § 2599; (5) costs on appeal, Code C. P., §§ 2558, 2560, 2589, 3240; (6) §§ 3228-3279 relating to awarding and enforcing payment of costs, fixing the amount of costs, and security for costs, apply only to actions in the Supreme Court, City Court of N. Y. and the County Courts, and not to proceedings in the Surrogates' Courts, Code C. P., § 3347, subd. 13.

N. C. 240. In determining whether to order security or not, the court takes into account the circumstances of the given case, *Bennett* v. *Goble*, 43 Hun, 354; *Fessenden* v. *Blanchard*, 48 Hun, 350; *Gifford* v. *Rising*, 48 Hun, 128 (130); *Fagan* v. *Strong*, 19 Civ. Pro. R. 88; *Caccavo* v. *R. W. & O. R. Co.*, 59 Super. Ct. 129, and will not exercise its discretion against a trustee unless there are reasonable grounds therefor, and it is not usual for an appellate court to interfere with a refusal to exercise the discretionary power. *Fessenden* v. *Blanchard*, 48 Hun, 350; *Schmidt* v. *Eiseman*, 26 N. Y. Supp. 766. Under §§ 3268 and 3269, security for costs may be demanded from a non-resident plaintiff. A non-resident trustee might be compelled to give security for costs, under these sections, although the court might not require it under § 3271. See *Gifford* v. *Rising*, 48 Hun, 128; *McDougal* v. *Gray*, 15 Civ. Proc. R. 237. Security may, under § 3271, be required after judgment against the plaintiff trustee has been entered and he has appealed. *Gifford* v. *Rising*, 48 Hun, 128. If defendant has been guilty of laches in not applying before judgment entered, it does not necessarily estop him from having security for costs of the appeal. *Id.* But if the delay is excusable, the court may even at that point in the proceedings require security for costs already accrued as well as for costs of the appeal. *Wood* v. *Blodgett*, 49 Hun, 64 (66). Under the sections relating to non-resident plaintiffs, the right to security being absolute, no notice of application for the order need be given, except that, in case of delay, and where, accordingly, the requirement of security, so far as relates to the costs before final judgment, is discretionary, plaintiff is entitled to notice. *Id.* But under § 3271, relating to trustees, where the granting of an order is always discretionary, notice is required in all cases. *Id.*; *Swift* v. *Wheeler*, 46 Hun, 580. It is also to be noticed that under § 3271, application must be made to the court, while in other cases the order may be made by the court or by a judge. Code, § 3272; *Wood v. Blodgett*, 49 Hun, 64 (66).

§ 296. **Security on appeal.**—" Where an appeal is taken, as prescribed in title second [Appeal to the Court of Appeals] or fourth [Appeal to Appellate Division] of this chapter, the court, in or from which the appeal is taken; or, where an appeal is

taken as prescribed in title third [Appeal to the Supreme Court from an inferior court] or fifth [Appeal from a final determination in a special proceeding] of this chapter, the court, to which the appeal is taken ; may, in its discretion, make an order, upon notice to the respondent, dispensing with or limiting the *security, required to stay the execution* of the judgment or order appealed from, as follows : "1. Where the appellant is an executor, administrator, trustee, or other person acting in another's right, the security may be dispensed with or limited, in the discretion of the court." Code C. P., § 1312. This section does not apply to the security to perfect the appeal, which must be given on appeal to the Court of Appeals, Code C. P., § 1326, and cannot be dispensed with. *Architectural Iron Works* v. *City of Brooklyn*, 85 N. Y. 652. And on other appeals, no security for costs is required, to perfect them. Code C. P., §§ 1343, 1351, 1360. If, however, the trustee, instead of seeking to have the security dispensed with or limited, gives security and is defeated on appeal, the lack of assets in the estate will not avail as a defence to an action on the undertaking, which must be paid by those executing it, whether the trust fund suffices or not. *Yates* v. *Burch*, 87 N. Y. 409. And in order to secure relief from giving security, the applicant must show that he is protecting another's right. If in reality he is acting to subserve his personal interests, he must give security. *Butler* v. *Jarvis*, 117 N. Y. 115. A trustee's lack of assets would be a good ground for limitation of security, in a proper case. *Mills* v. *Forbes*, 12 How. Pr. 466. As to the proper court to which to apply, under § 1312, see *Hills* v. *Peekskill Savings Bank*, 95 N. Y. 675. The mere pendency of an appeal by a trustee does not stay execution, if he has neither given security nor procured an order dispensing with it. *Matter of Morey*, 6 Dem. 287. The Code provisions affecting security for costs in actions apply to special proceedings. Code C. P., § 3279. But not in Surrogates' Courts, Code C. P., § 3347, subd. 13.

Where the Trust is Void.

§ 297. General principles.—If an attempt is made to create a trust, and it is afterward held void, the question is presented how far the trustee is liable for his acts in distributing corpus or

income, or doing other acts, called for by the trust instrument. Although not apparently referred to by the courts, it is obvious that there is a sweeping distinction between the cases where the creator of the trust was competent to transfer the property to the trustee, and, when the question of liability arises, is still living, and no other rights of subsequent purchasers from him, or of his creditors, have arisen ; and cases where he was not competent, or where his creditors or subsequent purchasers have acquired right to or against the property, or where the trust was created by will, or if by deed where he has died, and where accordingly his heirs, next of kin, or residuary devisees or legatees are entitled to the property in case the trust is invalid. As to the first class, it must be clear that the creator of the trust himself could not personally seek to charge the trustee with acts which he had directed him to do, even though the title had never vested in the trustee under a valid trust. But where other persons raise the question of liability on the theory that, the trust being void, the property is theirs, or that they have rights in it, or it is raised by or on behalf of the person who attempted to create it, on the theory of his incompetency, or of fraud, duress, or undue influence, the question presented is quite different.

" Upon the accounting of the trustees after the trust had been declared void, it would seem to be rather a startling proposition that they were to be indemnified for all payments made in good faith before such declaration. . . . It would seem generally as if a trustee acted, in carrying out the trust, at the peril of being able to maintain its validity when called upon. Trustees are favorites with courts of equity, and for that very reason they can at all times apply to the court to be informed as to their duty, or as to the validity of the trust which they have undertaken to carry out. Having this right, where their title to the funds depends upon the validity of the trust, as evidenced upon the face of the instrument, it is not too much to say to a trustee under such circumstances, if there be the least possible doubt of the validity of your title, bring the parties who might be interested in that question into court, and there have a judicial determination of its validity, and that determination will be a perfect protection for all your acts. If a trustee in a case involving any doubt chooses to go on and carry out the provisions of the trust,

he has but himself to blame in case of disaster." *O'Conner* v. *Gifford*, 117 N. Y. 275 (281–282), explaining *Hawley* v. *James*, 16 Wend. 60. Compare *Carter* v. *Board of Education*, 68 Hun, 435 (439), aff'd 144 N. Y. 621. And even where the invalidity of the trust depends on extrinsic facts, *e.g.*, mental incapacity of the creator of the trust, or duress or fraud in procuring its execution, it would appear that the same liability would exist, in the absence of a determination by the court. But where a judgment directs payments, and they are made accordingly, the fact that in a subsequent action the provision relating to them is held void does not render the trustees liable. *Shipman* v. *Rollins*, 98 N. Y. 311 (331). In *Leavitt* v. *Yates*, 4 Edw. Ch. 134 (205), the court held, that the trust being void, as being contrary to law, the trustees had no claim to salary or compensation though allowed by the terms of the deed. But it was held that whatever money had been expended in the keeping and preservation of the property or in the management of it with a view to its safety, while the title was in dispute, including reasonable clerk hire, the keeping of accounts and the expense of employing agents to look after the property when necessary, should be paid out of the property, and be allowed to the trustees under the head of just allowances. Also *Colburn* v. *Morton*, 1 Abb. Ct. App. Dec. 378 (389); *Loos* v. *Wilkinson*, 113 N. Y. 485; and see *Hardt* v. *Levy*, 79 Hun, 348. Compare *McSorley* v. *McSorley's Ex'rs*, 4 Sandf. Ch. 414; *Howland* v. *Heckscher*, 3 Sandf. Ch. 519. For a collection and review of authorities on this general subject, see Bishop on Insolvent Debtors, pp. 349 *et seq.*

General Assignments.—There are cases in which a trustee is protected for acts done in good faith under an instrument creating the trust, and before such instrument has been declared invalid; for example, an assignee under a general assignment for the benefit of creditors; for in such case, if the assignee pays money to *bona fide* creditors of the assignor, in accordance with the terms of the assignment, he will be protected, provided he does it in good faith and before any other creditor has obtained a lien upon the money; all that can be said is, if the assignment be declared void, that the assignor paid certain of his creditors, indirectly, and through the agency of the assignee, at a time when,

but for the assignment, he had the right to do it directly. *Nat. B. & D. Bank* v. *Hubbell*, 117 N. Y. 384 (397) and cases there cited; *Wilson* v. *Marion*, 147 N. Y. 589; *Pond* v. *Comstock*, 20 Hun, 492, aff'd 87 N. Y. 627; *Knower* v. *C. N. Bank*, 124 N. Y. 552; *McLean* v. *Prentice*, 34 Hun, 504. For a discussion of this principle, see *Carter* v. *Board of Education*, 68 Hun, 435 (439), aff'd 144 N. Y. 621. See on this general subject, Bishop on Insolvent Debtors, pp. 349 *et seq.* But if the property in question belonged not to the assignor but to a third party, the assignee is not protected as to payments thereof made by him in good faith without notice. His good faith cannot divest the real owner's title. *Nat. B. & D. Bank* v. *Hubbell*, 117 N. Y. 384 (397). In *Smith* v. *Dresser*, 35 Beav. 378; L. R. (1 Eq. Cas.) 651, the invalidity consisted in the fact that though on the face of the deed it was alleged that the necessary three fourths of the creditors had consented, in reality, as investigation would have revealed, such was not the fact, and the trustee was not allowed to retain the costs and expenses he had incurred in good faith prior to the commencement of the action. This case is cited with apparent approval in *O'Conner* v. *Gifford*, 117 N. Y. 275 (282), and attention is there called to the fact that the trust deed was not void on its face. The point was, however, not passed upon. See *Leavitt* v. *Yates*, 4 Edw. Ch. 134 (215). In *Wilson* v. *Marion*, 147 N. Y. 589, it was held that though a general assignment be void on its face, a purchaser from the assignee at public sale is not necessarily chargeable with notice.

§ 298. **Bona fide purchaser.**—Where a deed of land is procured by fraud, a subsequent purchaser from the fraudulent grantee, in good faith and without actual or constructive notice takes a good title as against the original grantor. *Holland* v. *Brown*, 140 N. Y. 344; *Murphy* v. *Briggs*, 89 N. Y. 446.

§ 299. **Void power.—Bona fide purchaser.**—In certain cases the law may actually annul and render void a power contained in a will, regular on its face, and only impeachable by proof of extrinsic facts making the statute applicable. In such a case, the power being void, even a *bona fide* purchaser for value cannot acquire a good title from the donee; *e.g.*, where after execution

of a will containing a power of sale, a child was born to testator, under circumstances such as to give the entire estate to the child, but the donee of the power sells to a *bona fide* purchaser, the child's rights are not diminished. But if the purchaser has paid off an incumbrance, he retains a lien for the amount so paid. *Smith* v. *Robertson*, 89 N. Y. 555. See end of § 524.

§ 300. **Estoppel.**—Parties may be estopped by acquiescence or neglect, from objecting to payments made by a trustee under a void trust. *O'Conner* v. *Gifford*, 117 N. Y. 275 (283, 284); *Matter of O'Brien*, 45 Hun, 284 (290). Even though a trust may be admittedly void, yet advantage can be taken of the fact only by parties interested in some capacity in the property, and then only by the proper procedure and at the proper time. Thus laches may bar a creditor's right to attack an executor's disposal of the estate according to the terms of a void trust. *O'Conner* v. *Gifford*, 117 N. Y. 275 (284).

(7) *The Trustee's Rights.*

(*a*) *Commissions.*

§ 301. **Historical.**—The office of trustee, as well as that of executor and administrator, was originally deemed purely honorary, and no compensation by way of commissions was allowed. Such was held to be the settled law of New York, in 1815, by Chancellor Kent, in *Manning* v. *Manning*, 1 Johns. Ch. 527 (534). In 1817 the Legislature passed an Act allowing the Court of Chancery, on the settlement of the accounts of *guardians*, *executors* and *administrators*, to make a reasonable allowance to them for their services over and above their expenses. (L. 1817, chap. 251.) The court thereupon adopted a rule fixing the percentages to be allowed. (3 Johns. Ch. 630.) With the changes effected by the revision, it became necessary, or was deemed desirable, to make this principle specifically applicable to the surrogates. Accordingly, L. 1828, 2d Meeting, ch. 21, par. 240, repealed the Act of 1817, ch. 251, the repeal to take effect December 31st, 1829; while by 2 R. S. 93, § 58, which took effect January 1st, 1830 (now § 2730 of the Code), corresponding provision was made for the allowance by *surrogates*, of commissions to executors and administrators, in terms following substantially

the former Chancery rule. It will thus be seen that the power was given by statute to the Court of Chancery, in 1817 ; and that this statute was replaced, January 1st, 1830, by an Act conferring it upon the surrogates ; and that both these statutes, so far as their express terms went, omitted specific mention of trustees. The next step came in 1842, when Chancellor Walworth (*Meacham* v. *Sternes*, 9 Pai. 398) held that Chancery, proceeding on the analogy of the law affecting executors and administrators in Surrogates' Courts, should allow to *trustees of express trusts* the same fixed compensation for services by way of commissions. And such has since continued to be the rule. *Phœnix* v. *Livingston*, 101 N. Y. 451 (456) ; *Matter of Schell*, 53 N. Y. 263 (266). At that time the Court of Chancery still retained exclusive control over all trustees. But by L. 1850, ch. 272, *surrogates* were given jurisdiction over the accountings of that class of trustees known as "testamentary trustees." And L. 1866, ch. 115, provided that on such accounting the surrogates should allow the same compensation for services by way of commission as was allowed by law to executors and administrators. The Laws of 1880, ch. 245, § 1, subd. 2 (3), and *Id.* § 2, repealed 2 R. S. 94, § 66, with its amendments, including L. 1850, ch. 272, and L. 1866, ch. 115, but provisions relating to testamentary trustees are now found in chap. 18, Title VI., of the Code. Specific statutory provisions for allowance of commissions to testamentary trustees, however, appear to have been omitted from the time of the repeal in 1880, until they were inserted in 1885 by amendment to § 2802 of the Code. Even now it might seem doubtful whether the statutory provisions specifically cover all contingencies, but this consideration is of no importance, inasmuch as it has been uniformly held that the surrogates have implied authority *by analogy*, like the Supreme Court, to allow the same commissions to testamentary trustees as are allowed by law to executors and administrators. The analogy is broken, by three specific statutory provisions relating respectively to general assignments for the benefit of creditors, to trustees of insolvent debtors, and to "deeds or trusts" to sell real or personal property for the benefit of creditors. See *post*, § 324. For a full discussion and statement of the law, see *Matter of Roosevelt*, 5 Redf. 601 ; cited and fully approved by the Court of Appeals,

in *Laytin* v. *Davidson*, 95 N. Y. 263 (267); also, *Matter of Mason*, 98 N. Y. 527 (534, *et seq.*); *Hurlburt* v. *Durant*, 88 N. Y. 121; *Johnson* v. *Lawrence*, 95 N. Y. 154.

§ 302. **The present statutes.**—"On the settlement of the account of an executor or administrator, the surrogate must allow to him for his services, and if there be more than one, apportion among them according to the services rendered by them respectively, over and above his or their expenses: For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five per centum. For receiving and paying out any additional sums not amounting to more than ten thousand dollars, at the rate of two and one half per centum. For all sums above eleven thousand dollars, at the rate of one per centum. In all cases such allowance must be made for their necessary expenses actually paid by them as appears just and reasonable. If the value of the personal property of the decedent amounts to one hundred thousand dollars or more, over all his debts, each executor or administrator is entitled to the full compensation on principal and income allowed herein to a sole executor or administrator, unless there are more than three, in which case the compensation to which three would be entitled must be apportioned among them according to the services rendered by them respectively, and a like apportionment shall be made in all cases where there shall be more than one executor or administrator. Where the will provides a specific compensation to an executor or administrator, he is not entitled to any allowance for his services, unless by a written instrument filed with the surrogate, he renounces the specific compensation. Where successive or different letters are issued to the same person on the estate of the same decedent, including a case where letters testamentary, or letters of general administration, are issued to a person who has been previously appointed a temporary administrator, he is entitled to compensation in one capacity only, at his election, except that where he has received compensation in one capacity he is entitled to the excess, if any, of the compensation allowed by law, above the sum which he has already received in the other capacity." Code C. P., § 2730.

Code C. P., § 2802, relating to the annual accounts of a testa-

mentary trustee, provides that "the surrogate before whom such accounting may be had shall allow to the trustee or trustees the same compensation for his or their services, by way of commission, as are allowed by law to executors and administrators, besides their just and reasonable expenses therein; and also the additional allowance provided for in section twenty-five hundred and sixty-two of this act." As to trusts for creditors, see *post*, § 324. Provision for commissions may be covered by Code C. P., § 2810, relating to accounting of a testamentary trustee, "when one year has expired since the probate of the will, or when the trusts, or one or more distinct and separate trusts, created by the will, have been, or are ready to be, fully executed." As to the meaning of the uncorrected section references found in §§ 2810, 2811, see *ante*, §§ 224, 229. Trustees are not required to part with the fund on which commissions are chargeable, until the latter are paid. *Wheelwright* v. *Wheelwright*, 2 Redf. 501; *Matter of Aymar*, 5 Dem. 428. But commissions must be applied in liquidation of a debt of a trustee to the estate, *Freeman* v. *Freeman*, 4 Redf. 211 (215); and in liquidation of claims against the trustee for losses resulting from negligence, etc., *Ward* v. *Ford*, 4 Redf. 34 (39).

§ 303. **On what allowed—In general.**—Trustees are entitled to commissions for receiving and paying out all moneys which constitute the corpus of the estate, and any additions thereto from increase of any kind, and thus the receipts upon which commissions are to be computed can never exceed the gross amount of the estate and its actual income; and the moneys paid out upon which commissions may be computed are the moneys paid out of the estate for debts, expenses of administration and to legatees or other beneficiaries, which appear to diminish the estate as it exists in the hands of the trustees and pass out of and away from the estate. Where there are distinct trusts under the same instrument, commissions may be computed on each separately, even though no actual separation of funds, into distinct lots, has been in fact effected. *Clute* v. *Gould*, 28 Hun, 348 (see 4 State Rep. 708); *Foote* v. *Bruggerhof*, 66 Hun, 406 (420). But in any given trust, they are computed on the amount received or paid out by all the trustees, and not on the sums received and

paid out by each. *Brush* v. *Smith*, 1 Dem. 477 (479). The allowance of commissions may be denied on the ground of gross negligence or other misconduct of the trustee. *Cook* v. *Lowry*, 95 N. Y. 103 (114); *Matter of Matthewson*, 8 App. Div. 8; *Clapp* v. *Clapp*, 49 Hun, 195; *Morgan* v. *Morgan*, 4 Dem. 353; *Yager* v. *Roberts*, 2 Redf. 247; *Gillespie* v. *Brooks*, 2 Redf. 349 (368). If a trustee does not act, he cannot have commissions. *Walke* v. *Hitchcock*, 5 Redf. 217; *Matter of Manice*, 31 Hun, 119. But see *Matter of Dunkel*, 5 Dem. 188 (192). But the right to commissions is not lost by keeping the accounts in a confused condition leading to expense in putting them in proper shape. *Hill* v. *Nelson*, 1 Dem. 357 (364). Commissions are to be computed as of date of settling, not the date of filing, the account, and according to the law then in force. *Naylor* v. *Gale*, 73 Hun, 53; *Savage* v. *Sherman*, 87 N. Y. 277 (283), approving the disposition below, 24 Hun, 307; *Haskin* v. *Teller*, 3 Redf. 316. Compare § 319, *post*.

§ 304. **On annual income.**—Commissions are allowed on annual income, when the trustee is required to keep funds invested, and to receive and pay out the income annually; if he does receive it, and renders an account thereof to the beneficiary, and pays over the net balance. *Matter of Mason*, 98 N. Y. 527 (535); *Hancox* v. *Meeker*, 95 N. Y. 528 (538, *et seq.*); *Matter of Allen*, 96 N. Y. 327. So where he renders *annual accounts* to the court, or where he is required or permitted to state his account with annual rests. *Id.*; *Morgan* v. *Hannas*, 13 Abb. Pr. (N. S.) 361; *Matter of Kellogg*, 7 Pai. 265; *Fisher* v. *Fisher*, 1 Bradf. 335; *Matter of Meserole*, 36 Hun, 298; *Matter of Goodrich*, 35 Hun, 299, note. And in all these cases, commissions on income are computed on each occasion at the full rate—on the first $1000, 2½ per cent for receipts and 2½ per cent for payments, etc.; *Matter of Kellogg*, 7 Pai. 265 (268); *Matter of Mason*, 98 N. Y. 527. But computations cannot be allowed more frequently than annually. Thus, if a trustee receives, accounts to the beneficiary, and pays over, each month, he cannot be allowed each month to subtract five per cent on the first $1000, etc. The total amount of income for the year must be taken as the basis. *Matter of Selleck*, 111 N. Y. 284 (292, *et seq.*).

§ 305. **On accumulations.**—Even annual computations at the full rate might not be allowed if the trustee received income *to accumulate*, or which he was allowed to accumulate, for several years, and then paid over a gross sum. *Matter of Mason*, 98 N. Y. 527 (536).

§ 306. **On land.**—Where trustees hold land for a designated term, the beneficial remainder being vested in others (or where, it is assumed, practically the same situation exists under a somewhat different form where the beneficial fee is granted or devised subject to the estate of the trustees), the trustees are not entitled to commissions except on proceeds realized by actual sale of the land under power conferred on them by the trust instrument. If it is not sold, the trustees cannot be said to have "received and paid out money." *Phœnix* v. *Livingston*, 101 N. Y. 451 (456, *et seq.*); *Matter of Clinton*, 16 Misc. 199; *Matter of McLaren*, 6 Misc. 483. A different view of this matter is taken in *Matter of Martens*, 16 Misc. 245. But property may be real estate in actual fact, but personalty in contemplation of equity, as where land on which trustees hold a mortgage is bid in by them on foreclosure sale; in such a case it appears that commissions may be allowed. *Matter of DePeyster*, 4 Sandf. Ch. 511 (514); *Phœnix* v. *Livingston*, 101 N. Y. 451 (457). So no commissions are allowed to executors having a power to allot and partition, which they in fact exercise. *Bruce* v. *Lorillard*, 62 Hun, 416 (419). Nor where, land being devised subject to a power of sale, the donees of the power join, from mere caution, and unnecessarily, in deeds of partition among the owners. *Matter of Tilden*, 44 Hun, 441 (445). But where there was a direction to convert land, and hold in trust, and ultimately pay over the proceeds, and no sales were made, the remaindermen preferring to take it as land, and it was deeded to them and they gave receipts as for cash received, it was held that commissions should be allowed. *Smith* v. *Buchanan*, 5 Dem. 169. Where land representing trust and other funds is sold by the trustee, and the other funds are distributed by him, he has no claim on the trust estate for a commission on those other funds. *McKee* v. *Weeden*, 1 App. Div. 583.

§ 307. **On incumbrances.**—Where trustees sell property sub-

ject to incumbrances upon it, they are not entitled to commissions upon the amount of the incumbrances. For in that class of cases, the incumbrances themselves do not represent any payment to the trustee, but the purchaser receives the property subject to the incumbrance.[1] But it has been held that where a trustee, in order to effect a sale of incumbered property, binds himself to pay it off and discharge it, and does, in fact, pay off the mortgage, and thereupon receives payment from the purchaser for the total value of the property unincumbered, he is entitled to commissions on this total sum received. *Matter of Security L. I. & A. Co.*, 31 Hun, 36 (39), aff'd 95 N. Y. 654. This ruling is apparently based on the view that the situation presented was the same as if the trustee had originally received the property unincumbered and had sold it for value and then had used a part of the purchase price to pay unsecured debts for which the trust estate was liable. Where a trustee advances money to pay *taxes* on lands held by him in trust, and afterward reimburses himself from the proceeds of sale of the same lands, he is not allowed commissions upon the amount thus paid for taxes, for in that case, if commissions were allowed, he would receive double commissions upon the same sums of money passing into his hands, for he would then have commissions upon the original and the final disbursement of the moneys, and also upon their advancement for the payment of taxes and their subsequent reimbursement out of the proceeds. This differs from the case of an advance to pay off a mortgage and a reimbursement of the advance out of the proceeds of the sale of the land thus freed from incumbrance. For in such case, the trustee receives only one commission on the total amount received in payment for the unincumbered property, one half for receiving that total, and one half on paying over the proceeds, these proceeds being thus paid out partly to himself as a reimbursement and partly on final disposition of the balance, in accordance with the terms of the trust. *Matter of Security L. I. & A. Co.*, 31 Hun, 36 (39-40), aff'd 95 N. Y. 654.

§ 308.—**On securities not sold.**—In the case of *executors*, no

[1] *Matter of Security L. I. & A. Co.*, 31 Hun, 36, aff'd 95 N. Y. 654; *contra Cox* v. *Schermerhorn*, 18 Hun, 16.

commissions are allowed on shares of corporate stock, etc., received and turned over to legatees under a specific bequest. *Schenck* v. *Dart*, 22 N. Y. 420 (424). See *Hawley* v. *Singer*, 5 Dem. 82 (84); *Farquharson* v. *Nugent*, 6 Dem. 296. This case is analogous in some respects to that of a bequest of stock to trustees to hold, and at the end of the trust term to turn over *in specie* to a legatee. But in *Cairns* v. *Chaubert*, 9 Pai. 160, it was held that where an executor, instead of calling in the money upon good and collectible bonds and mortgages, transfers such securities to a third person for the use of the legatees, with their assent, he is entitled to the same commissions as if he had actually received and paid over the money, or invested it as directed by the will. Compare *Hawley* v. *Singer*, 5 Dem. 82 (87). This case is to be distinguished from *Schenck* v. *Dart*, *supra*, in that there the assets were specifically bequeathed, while here they were not; and it is stated by the court in *Bruce* v. *Lorillard*, 62 Hun, p. 426, that in the *Cairns case* the executors had the power, and it would have been their duty, to sell the securities, but for the consent of the parties interested. The *Cairns case* is like that of a trustee in that the latter would have full power to sell; but unlike in that it would not generally be his duty to convert good bonds and mortgages into cash. In *Matter of De Peyster*, 4 Sandf. Ch. 511, it is held that a trustee is entitled to commissions on securities, though he transfer to the beneficiaries the identical ones he originally received; and this ruling is cited with approval in *Matter of Mason*, 98 N. Y. 527 (536); and referred to in *Ogden* v. *Murray*, 39 N. Y. 202 (203); see also *Matter of Moffat*, 24 Hun, 325; *Matter of Curtiss*, 15 Misc. 545 (552); *McAlpine* v. *Potter*, 126 N. Y. 285; *Matter of Turfler*, 24 N. Y. Supp. 91; *Matter of Hawley*, 104 N. Y. 250.

§ 309. **On legacies and annuities.**—Commissions are provided for before legacies from the trust fund are paid; out of the net surplus then remaining for distribution, legacies payable therefrom are to be drawn. Therefore the legacy itself is not to be diminished by subtraction from it of a *pro rata* share of the commissions; though if, after allowing for commissions, the fund remaining for distribution were insufficient to supply the specific

sums called for by the will, this result would constitute an indirect charge of commissions *pro rata* on such legacies. *Westerfield* v. *Westerfield*, 1 Bradf. 198. The same rule should be applied to annuities—that is, where a certain sum named is to be paid annually. *Cammann* v. *Cammann*, 2 Dem. 211 (212); *Whitson* v. *Whitson*, 53 N. Y. 479. In such cases the estate must bear the burden of commissions for receiving and paying out the income. *Id.* But where the use of a fund, even of specified amount, is left to a beneficiary for life, or the fund is given to trustees to pay over the income for life to a beneficiary, the case is different, and the life beneficiary receives his income less commissions thereon. *Whitson* v. *Whitson*, 53 N. Y. 479; *Cammann* v. *Cammann*, 2 Dem. 211 (212) and cases there cited; *Clute* v. *Gould*, 28 Hun, 348. Compare *Petrie* v. *Petrie*, 7 Lans. 90 (96). But, if it is a bequest for life, he may, on giving adequate security, receive it himself, so as to enjoy the income free from commissions. *Livingston* v. *Murray*, 68 N. Y. 485 (493).

§ 310. **On investment and re-investment.**—It is only on the original receiving and ultimate paying out of corpus or income, that commissions are computed. Thus, the trustee cannot have commissions on a given amount every time he pays it out in return for investment securities, or receives it again on selling those securities, nor on all payments and receipts in the conduct of a business carried on as trustee. In one sense, in such cases, he pays it out and receives it again, but not in the sense intended by the statute. *Matter of Hayden*, 54 Hun, 197 (205), (aff'd 125 N. Y. 776); *Matter of Kellogg*, 7 Pai. Ch. 265; *Beard* v. *Beard*, 140 N. Y. 260 (265), and cases there cited.

§ 311. **Commissions on commissions** are not allowed; for example, where commissions are allowed for the services of a deceased trustee, and are directed to be paid over by the present trustee, the latter cannot have a commission on the sum thus paid out. *Betts* v. *Betts*, 4 Abb. N. C. 317 (438).

§ 312. **On losses restored.**—It has been held, that if the negligence of the trustee results in a loss which he is required to,

and does, make good, commissions may be allowed on such amount, as if it had never been lost. *Matter of Mount*, 2 Redf. 405. Also on *debts due to the trustee*, and paid to him from the fund. *Id.*; *Matter of Carman*, 3 Redf. 46 (50); *Meacham* v. *Sternes*, 9 Pai. Ch. 398. See also *Ward* v. *Ford*, 4 Redf. 34 (39).

§ 313. **On illegal payments** made by the trustee, no commissions are allowed. *Matter of Hobson*, 61 Hun, 504 (aff'd 131 N. Y. 575).

§ 314. **Double commissions.**—Where the same person acts both as executor and as trustee under a will, he may, or may not, receive full commissions in each capacity, according to the application of the following principles. To entitle the same person to commissions as executor and as trustee, the following elements must exist: (1) The will must provide either in express terms or by fair intendment, for the separation of the two functions and duties, one duty to precede the other and to be performed before the latter is begun, or substantially so performed; and must not provide for the co-existence continuously and from the beginning of the two functions and duties. And where the will does so provide for the separate and successive capacities, then that of trustee must also be actually entered upon and the performance of its duties begun, either (2) by a real severance of the trust fund from the general assets, or (3) by a judicial decree which wholly discharges the executor, either in terms or by legal effect, and leaves him acting and liable only as trustee. *Johnson* v. *Lawrence*, 95 N. Y. 154 (162); *Laytin* v. *Davidson*, 95 N. Y. 263; *McAlpine* v. *Potter*, 126 N. Y. 285; *Hurlburt* v. *Durant*, 88 N. Y. 121 (127); *Cluff* v. *Day*, 124 N. Y. 195 (203); *Matter of Crawford*, 113 N. Y. 560 (568); *Matter of Willets*, 112 N. Y. 289 (296); *Phœnix* v. *Livingston*, 101 N. Y. 451; *Matter of Mason*, 98 N. Y. 527; *Hall* v. *Hall*, 78 N. Y. 535; *Drake* v. *Price*, 5 N. Y. 430; *Matter of Leinkauf*, 4 Dem. 1; *Bacon* v. *Bacon*, 4 Dem. 5; *Matter of Emerson*, 59 Hun, 244; *Matter of Babcock*, 52 Hun, 510; *Matter of Jackson*, 32 Hun, 200; *Blake* v. *Blake*, 30 Hun, 469; *Wildey* v. *Robinson*, 85 Hun, 362; *Matter of Beard*, 77 Hun, 111 (com-

pare *Matter of Hood*, 98 N. Y. 363 ; s. c. 104 N. Y. 103, as reviewed in *Cluff* v. *Day*, 124 N. Y. 195, 201–202). It has been held that where the executor is not, under the foregoing rule, entitled to double commissions, he is entitled, on final accounting as executor, to receive full commissions then, without waiting to complete his duties as trustee. *Mann* v. *Lawrence*, 3 Bradf. 424 (426). This appears to be erroneous ; for the very theory on which double commissions in such a case are refused, is that all the duties throughout are to be performed by the executor as such, so that there can be no point prior to the ultimate accounting at which he can be said to have accounted as executor, and completed his executorial duties. Where the right to double commissions exists, one half of the second full commission may be allowed for "receiving," when the executor duly pays the fund over to himself as trustee, the other half to be allowed when he accounts for it as paid out. *Matter of Willets*, 112 N. Y. 289 (297). The final sentence of § 2730 of the Code (formerly § 2738), prohibiting double commissions "where successive or different letters are issued to the same person," does not apply to the case of the same person acting in distinct capacities as executor and as trustee under a will. *Hall* v. *Campbell*, 1 Dem. 415 (420), and the cases above cited concerning double commissions.

§ 315. **On sums of $100,000 or over.**—§ 2730 of the Code, allowing full commissions for each trustee (not exceeding three) where the estate amounts to $100,000 or more, applies only where the sum on which commissions are, on a given occasion, to be computed, amounts to $100,000 or more. Thus, the fact that the principal sum exceeds $100,000, while warranting double or treble commissions for receiving and paying out that principal, does not warrant such allowance for receiving and paying out the income thereof, unless the income itself, on which commissions are to be computed, amounts to $100,000 or more. *Matter of Willets*, 112 N. Y. 289 (298). Also *McAlpine* v. *Potter*, 126 N. Y. 285 (292). But if the income itself, which is accounted for, does amount to $100,000, full commissions are allowed for each trustee not exceeding three, and whether the income be derived from real or personal property. *Matter of*

Leggatt, 4 Redf. 148. The same provision also has, as to commissions on corpus, no application to a case where there are three trustees, who resign before completing their duties. *Matter of Hayden*, 54 Hun, 197 (205–206), aff'd 125 N. Y. 776; see *Welling* v. *Welling*, 3 Dem. 511; *Matter of Kenworthy*, 63 Hun, 165. As to the case where one of two trustees dies during the term, see *Matter of Newland*, 7 Misc. 728; *Welling* v. *Welling*, 3 Dem. 511. The question of whether or not an estate is worth $100,000 is, for the purpose of estimating commissions, to be determined by a valuation at the time of the accounting. *Matter of Blakeney*, 1 Con. 128. The question presents difficulty only where there are securities, not converted into cash. But in such case, no commissions are allowed until they are so converted, or are turned over to those entitled, at a fixed valuation, and it would seem, therefore, that the cash received for them, if cashed, and the actual amounts paid out in cash, or on agreed valuations, should be taken as the basis of computation. And it has been held that property, though not subject to commissions till actually converted, is to be counted in, at its estimated value, in determining whether or not the total estate amounts to $100,000. *Matter of Clinton*, 16 Misc. 199; *Matter of McLaren*, 6 Misc. 483. The question whether in any case principal and income may be added together to make up the $100,000 is also considered in *Matter of Blakeney*, 1 Con. 128. As to a case where, of several executors named, one qualifies, receives full commissions, and dies, and then another qualifies, see *Matter of Depew*, 6 Dem. 54.

§ 316. **When to be taken.**—The commissions of trustees are to be allowed on the settlement of their accounts, and the general rule is that they cannot be legally taken before. *Beard* v. *Beard*, 140 N. Y. 260 (265) and cases there cited. There are exceptions to this rule. Thus, although the statute indicates no division of the commissions, which should apportion one half to the receiving and the balance to the paying out, the courts have allowed it in proper cases, so as to allow one half, on accounting, though the fund still remains in the trustee's hands. *Matter of Kellogg*, 7 Pai. Ch. 265 (267–268); *Matter of Willets*, 112 N. Y. 289 (297); *Matter of Roosevelt*, 5 Redf. 601. Another

exception exists where the trustees settle with the beneficiaries and pay over the residue or income of the estate. There they may first deduct and retain their commissions without waiting for a judicial settlement of their accounts. *Beard* v. *Beard*, 140 N. Y. 260 (265). And also, if the trustees at the time of taking their commissions had actually earned them, and took them acting in good faith and honestly believing that they were entitled to take them, and did not thereby cause any damage or injury to the estate, they cannot be held liable for interest thereon on the sole ground that they took them prematurely. *Beard* v. *Beard*, 140 N. Y. 260 (265–266) citing *Price* v. *Holman*, 135 N. Y. 124.[1] And if the property "received," consists of securities which were received as such by the trustee, and are still in his hands, half commissions, based on estimated value, are not allowed, for such "receiving." When they are converted into money, or turned over to and accepted by the beneficiaries in payment, commissions may then be allowed. *McAlpine* v. *Potter*, 126 N. Y. 285. Where a trustee pays out the entire income, annually, without reserving commissions, it has been held that the same may be allowed to him to be subtracted from future income. *Oakley* v. *Oakley*, 3 Dem. 140 (144).

§ 317. **When assignable.**—On grounds of public policy an assignment by a trustee, of his commissions, before they are ascertained and liquidated in the manner prescribed by law is void. *Matter of Worthington*, 141 N. Y. 9. But see *Matter of Hopkins*, 32 Hun, 618; aff'd 98 N. Y. 636.

§ 318. **Apportionment of commissions,** among several executors, is provided for in certain instances in § 2730 of the Code, and the effect of that provision is illustrated in many cases. *Betts* v. *Betts*, 4 Abb. N. C. 317 (437); *Matter of Delaplaine*, 19 Abb. N. C. 413, aff'd 45 Hun, 225; *Matter of Harris*, 4 Dem. 463; *Smith* v. *Buchanan*, 5 Dem. 169; *Matter of Dunkel*, 5 Dem. 188. Also cases cited *ante*, §§ 314, 315.

§ 319. **Provision in trust instrument.**—If the trust instrument is silent on the subject of commissions, the foregoing rules

[1] With *Beard* v. *Beard*, *supra*, compare *Matter of Herrick*, 12 N. Y. Supp. 105 (109–110), aff'd as *Matter of Smith*, 131 N. Y. 239.

apply ; but it may of course provide for an allowance to the trustee in addition to commissions, or in lieu of them. *Downing* v. *Marshall*, 1 Abb. Ct. App. Dec. 525 (547) ; *Waters* v. *Collins*, 3 Dem. 374 ; *Secor* v. *Sentis*, 5 Redf. 570 ; *Lent* v. *Howard*, 89 N. Y. 169. In such case, see as to election between such provision and legal commissions, § 2730 of the Code. Thus, if the will provides for "reasonable compensation," the testator thereby confides the adjustment of a proper allowance, in the given case, to the courts. *Matter of Schell*, 53 N. Y. 263 (266). For the allowance made under this ruling, see *Matter of Schell*, 4 Hun, 65. But where, as in a general assignment, extra compensation cannot be provided for, a provision for a "just and reasonable" compensation will, in aid of the assignment, be construed to refer to legal commissions. *Campbell* v. *Woodworth*, 24 N. Y. 304. An agreement by a trustee not to claim commissions is binding. *Matter of Hopkins*, 32 Hun, 618, aff'd 98 N. Y. 636. Compare the remarks of the court in *Matter of Worthington*, 141 N. Y. 9. After the right to commissions has vested, it cannot be affected by subsequent legislation. *Matter of Security L. I. & A. Co.*, 31 Hun, 36 (38), see 95 N. Y. 654. Compare end of § 303, *ante*. The mere fact that the will gives a legacy to the trustee does not defeat his claim to commissions unless it appears that it was intended to be in lieu thereof. *Matter of Mason*, 98 N. Y. 527 (533) ; *Campbell* v. *Mackie*, 1 Dem. 185. If the will allows to a trustee a given percentage on "all moneys *collected* by him," he is restricted, so far as this clause goes, to "collections" in the popular sense ; it does not cover all "receipts." *Ireland* v. *Corse*, 67 N. Y. 343. The term "debts collected" has been held to cover money received from the United States in payment of the principal of government bonds. *Matter of Tilden*, 44 Hun, 441 (444). It is provided by § 2730 of the Code that "where the will provides a specific compensation to an executor or administrator he is not entitled to any allowances for his services, unless by a written instrument filed with the surrogate, he renounces the specific compensation." No time is fixed within which election must be made, nor is there any provision authorizing a retraction, after the instrument is once filed. *Matter of Weeks*, 5 Dem. 194 (200). But the right to elect may be lost by laches. *Arthur* v.

Nelson, 1 Dem. 337 (347). Though the will provides for extra compensation for the trustee's services, his removal from the office deprives him of the right to that compensation. *Widmayer* v. *Widmayer*, 76 Hun, 251 (255). On the construction of various testamentary provisions relating to commissions, see *Greer* v. *Greer*, 5 Redf. 214; *Matter of Tilden*, 44 Hun, 441 (446). If the will expressly provides that no compensation shall be allowed, trustees who choose to act cannot have commissions *Secor* v. *Sentis*, 5 Redf. 570; *Matter of Gerard*, 1 Dem. 244. But such a construction of the will, unless perfectly clear, is not favored. *Marshall* v. *Wysong*, 3 Dem. 173.

§ 320. **"Same Compensation"—Meaning.**—The effect of a statute (or rule) that trustees shall receive the "same compensation" as executors, does not mean that when the same persons are both executors and trustees, they are to receive commissions in both capacities on the same fund at the same time. *Hall* v. *Hall*, 78 N. Y. 535.

§ 321. **To each trustee.**—The law permits compensation to each of several trustees who serve to the end of the trust, without regard to the actual trouble or labor to which they have been put. *Matter of Allen*, 96 N. Y. 327. Compare Code C. P., § 2730.

§ 322. **On resigning.**—Where a trustee resigns, before the end of the trust, he cannot insist on compensation, as of course; its allowance is discretionary, and if he receives it at all, the fixing of the amount by the court, within the statutory limits, constitutes one of the terms or conditions of his discharge, and the decision of the court within those limits is not subject to review in the Court of Appeals. *Matter of Allen*, 96 N. Y. 327. (Compare *Matter of Hayden*, 54 Hun, 197 (204), aff'd 125 N. Y. 776.) *Matter of DePeyster*, 4 Sandf. Ch. 511; *Matter of Jones*, 4 Sandf. Ch. 615; *Phillips* v. *Lockwood*, 4 Dem. 299. In this connection, the cases last cited should be compared with those elsewhere considered (§ 316) laying down the rule that a trustee is not required to wait till he has both "received and paid out" before he can have any commissions, but may be

allowed half for "receiving," and need only wait for the other half until he has "paid out." As to the rule of allowances where there are successive trustees, see *Matter of Depew*, 6 Dem. 54.

§ 323. **On removal.**—The fact that a trustee is removed does not necessarily imply moral delinquency; there are cases, and they are probably not infrequent, where commissions are allowed to a trustee upon removing him. See *Lyendecker* v. *Eisemann*, 3 Dem. 72. Compare *ante*, § 303. If, after the surrogate has denied an application to remove a trustee, he accounts, and is allowed commissions, and then the surrogate's original decree refusing to remove him is reversed on appeal, the remedy is by appeal from the allowance of commissions, and not by motion. *Matter of Humfreville*, 8 App. Div. 312. If a testamentary trustee pays over all the income to the beneficiary, and does not reserve commissions, and is then removed and turns over the trust securities to his successor, the surrogate has no jurisdiction to direct the successor to pay commissions to him. *Matter of Bevier*, 17 Misc. 486.

§ 324. **Trusts for creditors.**—(*a*) *General assignments.* These constitute one class of express trusts, and so far as concerns real estate, they come directly within the terms of subdivision 1 of § 76 of the Real Property Law, relating to the first class of express trusts, to sell real property for the benefit of creditors. But the subject of commissions in connection with general assignments is regulated by a special provision of the Act relating to general assignments, to the effect that the assignee shall receive a commission of 5 per cent. on the whole sum which comes into his hands. Under this provision, it has been held that it refers to money actually received and not to the whole estate covered by the assignment. *Matter of Hulburt*, 89 N. Y. 259. In so far as the subject of general assignments is regulated by special statutes not applicable to express trusts in general, it is unnecessary to consider it in detail here, as it is fully covered by the discussion in the 3d edition of Bishop on Insolvent Debtors, where the special subject of commissions is treated at pages 351 and 557. (*b*) *Trustees of Insolvent Debtors under Rev. Stat.*

At page 584 of the same work is a statement of the law regarding commissions of trustees of insolvent debtors appointed under the Revised Statutes, who also are entitled to commissions at the rate of 5 per cent. on the whole sum which shall have come into their hands. (*c*) *Deed or trust to sell for creditors.* "Any trustee, under a deed or trust to sell real or personal property for the benefit of creditors, shall be entitled to and allowed, upon an accounting hereafter had, the same commissions as an assignee for the benefit of creditors." L. 1896, ch. 249, § 1.

§ 325. **Other trustees.**—As already stated, it is the general rule that trustees are entitled to receive the same compensation as that allowed by law to executors and administrators. It has been dimly suggested in some cases that there might possibly be exceptions to this rule in the case of trustees of express trusts, but no instance of any such exception, other than those covered by the statutes referred to in the preceding section, has been found, and the rule may be considered settled in respect to such trustees unless some very exceptional and extraordinary circumstances should show that it would be inequitable to apply it to them. But in regard to other classes of trustees, while the same rule generally applies, there are exceptions in certain cases arising out of the express provisions of particular statutes. On this point the following cases may be consulted. *Receiver of Monied Corporation. Receiver of Insolvent Insurance Company. Matter of Security L. I. & A. Co.*, 31 Hun, 36; see 95 N. Y. 654; Code of Civil Procedure, § 3320; *Attorney-General* v. *Guardian M. L. I. Co.*, 93 N. Y. 631; *Attorney-General* v. *North American L. I. Co.*, 89 N. Y. 94. *Trustees of an unincorporated company*, where the persons in control constitute themselves trustees. *Ogden* v. *Murray*, 39 N. Y. 202.

(*b*) *Allowance for Expenses.*

§ 326. **General expenses.**—Although a trustee is confined strictly to legal commissions as compensation for his own services, and cannot receive any additional allowance for his work, however meritorious and extraordinary it may be; *Collier* v. *Munn*, 41 N. Y. 143; *Matter of Hayden*, 54 Hun, 197 (203), see 125 N. Y. 776; *Pullman* v. *Willets*, 4 Dem. 536 (but compare *Lent*

v. *Howard*, 89 N. Y. 169 ; *Matter of Young*, 17 Misc. 680) ; *Matter of McCord*, 2 App. Div. 324 ; and cannot, as a general rule, employ others, at the expense of the estate, to perform work such as can fairly be expected from himself (*Matter of Harbeck*, 81 Hun, 26, aff'd 145 N. Y. 648, where an item of $100 a year for a book-keeper was disallowed), yet there are many cases, where the duties are onerous, or where they are of such a character as to fall outside the fair scope of what is to be required of the trustee, or where they call for special skill and training, in which he may employ clerks, book-keepers, agents, attorneys, and others to assist him ; and he is also allowed for all disbursements necessary for the protection of the estate. *Davis* v. *Stover*, 58 N. Y. 473 ; *Young* v. *Brush*, 28 N. Y. 667. Thus the trust fund must bear the expenses of its administration, as expenses of litigation, though the trust instrument is silent on the subject ; and travelling expenses. *Woodruff* v. *N. Y. L. E. & W. R. R. Co.*, 129 N. Y. 27 (30, 31) ; compare *Matter of Ingersoll*, 6 Dem. 184. So with proper charges for office rent and office expenses ; *Matter of Nesmith*, 140 N. Y. 609 (617) ; and the salary of a clerk ; *Hawley* v. *James*, 16 Wend. 60 (284) ; *Meeker* v. *Crawford*, 5 Redf. 450 (464) ; *Hall* v. *Campbell*, 1 Dem. 415 ; *Fisher* v. *Fisher*, 1 Bradf. 335 ; *Matter of Butler*, 1 Con. 58 ; *Clinch* v. *Eckford*, 8 Pai. Ch. 412 ; *Vanderheyden* v. *Vanderheyden*, 2 Pai. Ch. 287 ; (compare *Fowler* v. *Lockwood*, 3 Redf. 465) ; the charges of an accountant ; *Matter of Quin*, 1 Con. 381 ; *Underhill* v. *Newburger*, 4 Redf. 499 ; or of an agent, where the duties do not require the exercise of the trustee's own discretion or of a power lodged solely in him. *Glover* v. *Holley*, 2 Bradf. 291. An agent so employed, to collect rents, has no power to endorse, in the trustee's name, a check drawn to the order of the trustee, and such endorsement is ineffectual. *Robinson* v. *Chemical Nat. Bank*, 86 N. Y. 404. If he may employ an agent at all, he may employ in that capacity the creator of the trust ; *Browning* v. *Hart*, 6 Barb. R. 91 ; or the beneficiary ; *Phœnix* v. *Livingston*, 101 N. Y. 451 (455) ; or one indebted to the estate, in which case the value of the latter's services is a proper counterclaim in any action to recover the debt. *Davis* v. *Stover*, 58 N. Y. 473. The point that the employee is indebted to the trustee, as trustee, but that his claim

is against the trustee personally (see *ante*, § 177 *et seq.*), and that if he brought suit himself, the defendant in his suit would not be the same person (in point of capacity) as the plaintiff in the suit against him, is not there discussed, though it was raised. See *Smith* v. *Felton*, 43 N. Y. 419. And the trustee may, it seems, in certain cases avail himself of the assistance of a lobbyist. *Duffy* v. *Duncan*, 32 Barb. R. 587, aff'd, without comment on this point, 35 N. Y. 187. But compare *Mills* v. *Mills*, 40 N. Y. 543 ; *Trist* v. *Child*, 21 Wall. 441. But a direction to trustees, in the will, to appoint and employ a specified person as their attorney, agent, etc., does not entitle that person to compel them to employ him. *Foster* v. *Elsley*, L. R. 19 Ch. D. 518 ; *Shaw* v. *Lawless*, 5 Cl. & F. 129 ; *Finden* v. *Stephens*, 2 Phill. 142.[1]

§ 327. **Counsel fees.**—And where it is proper for a trustee to employ counsel to advise him, or to represent him in an action or special proceeding, or attend to other affairs requiring legal knowledge or experience, he will be allowed his payments for such services, so far as proper and reasonable. *Woodruff* v. *N. Y. L. E. & W. R. R. Co.*, 129 N. Y. 27 (30, 31) ; *Douglas* v. *Yost*, 64 Hun, 155 ; *Matter of Holden*, 126 N. Y. 589 ; *Matter of Hutchinson*, 84 Hun, 563. But where the services are such as constitute part of the work for which the commissions are allowed, and can be done by a layman, or where they are not required at all, he should not be allowed for counsel fees. *Matter of Quinn*, 16 Misc. 651 ; *Pullman* v. *Willets*, 4 Dem. 536 ; *Matter of Peyser*, 5 Dem. 244. And counsel fees, where allowed, are not confined to the statutory costs. *Douglas* v. *Yost*, 64 Hun, 155 ; *Wetmore* v. *Parker*, 52 N. Y. 450 (466) ; *Downing* v. *Marshall*, 37 N. Y. 380 ; *Matter of Bailey*, 47 Hun, 477 ; see Code C. P., § 2561. As to allowances beyond those fixed by statute, for services in connection with an account-

[1] Other authorities illustrating allowances for expenses are : *Leavitt* v. *Yates*, 4 Edw. Ch. 134 (205-206) ; *Elliott* v. *Lewis*, 3 Edw. Ch. 40 (42) ; *Valentine* v. *Valentine*, 3 Dem. 597 ; *Upson* v. *Badeau*, 3 Bradf. 13 ; *Journault* v. *Ferris*, 2 Dem. 320 ; *Brautigam* v. *Escher*, 2 Dem. 269 ; *Mayer* v. *Hazard*, 49 Hun, 222 ; *Blunt* v. *Syms*, 40 Hun, 566 ; *Jack* v. *Robie*, 48 Hun, 181 ; *Matter of Archer*, 23 Supp. 1041.

ing, see *Seaman* v. *Whitehead*, 78 N. Y. 306 ; *Harward* v. *Hewlett*, 5 Redf. 330 ; and an elaborate review of the authorities in *Matter of Smith*, 2 Con. 418 ; for a general discussion of allowances in Surrogate's Courts, see 1 Con. Appendix, p. 563 ; *Matter of Collyer*, 1 Con. 546. The general rule is that a trustee's claim in his account, for counsel fees, or other expenses, cannot be allowed until he has in fact paid them. The allowance is made on the theory of reimbursement for necessary expenditures. *Matter of Bailey*, 47 Hun, 477 ; *Matter of Spooner*, 86 Hun, 9. But the question of the propriety of allowing counsel fees, and their amount, may arise in such a form that the court may properly pass on it before actual payment, deferring any credit to the trustee, until payment shall have been made by him. *Douglas* v. *Yost*, 64 Hun, 155 (161) ; *Matter of Att'y. General* v. *North Am. L. Ins. Co.*, 91 N. Y. 57 (61) ; *Downing* v. *Marshall*, 37 N. Y. 394 ; *Wetmore* v. *Parker*, 52 N. Y. 466 ; *Gilman* v. *Gilman*, 6 T. & C. 211 ; aff'd 63 N. Y. 41 ; *Matter of Barnes*, 140 N. Y. 468. Inasmuch as the trustee is individually liable for counsel fees, and other expenses incurred in managing and protecting the estate, *Mygatt* v. *Wilcox*, 45 N. Y. 306 (309), the attorney, or other creditor, not being a party to the proceedings in which the amount to be allowed to the trustee is determined, is not bound thereby, and may enforce his claim for any balance justly due, against the trustee individually. *Mygatt* v. *Wilcox*, 1 Lans. 55 ; not referred to on appeal, s. c. 45 N. Y. 306.[1]

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[1] Other cases illustrating allowances *for counsel fees* are : *Matter of Delaplaine*, 1 Con. 1 ; *Matter of Weeks*, 5 Dem. 194 ; *Matter of Van Kleeck*, 2 Con. 14 ; *Matter of Bradley*, 1 Con. 106 ; *Hasler* v. *Hasler*, 1 Bradf. 248 ; *Walton* v. *Howard*, 1 Dem. 103 ; *Campbell* v. *Mackie*, 1 Dem. 185 ; *Thompson* v. *Mott*, 1 Dem. 32 ; *Savage* v. *Sherman*, 87 N. Y. 277 (285) ; *Osborne* v. *McAlpine*, 4 Redf. 1 ; *Matter of Hulburt*, 89 N. Y. 259 ; *Matter of Thomas*, 5 Abb. N. C. 354 : *Havemeyer* v. *Loeb*, *Id.*, 338 ; *Matter of Youngs*, *Id.*, 355, note ; *Matter of Weinhaus*, *Id.*, 355 ; *Matter of Smith*, 26 Abb. N. C. 56 ; *Matter of Aplington*, *Id.*, 69 ; note, 28 Abb. N. C. 371 ; *Heather's Estate*, 15 Abb. N. C. 194 ; *Matter of Denike*, 21 Abb. N. C 289 ; *Platt* v. *Archer*, 13 Blatch. 351 ; *Levy's Accounting*, 1 Abb. N. C. 177 ; *Matter of Lockman*, 4 Abb. N. C. 173 ; *Halsey* v. *Van Amringe*, 6 Pai. Ch. 12 ; *Mayer* v. *Hazard*, 49 Hun, 222 ; *Matter of Grout*, 15 Hun, 361 ; *Matter of Commonwealth F. I. Co* , 32 Hun, 78 ; *Matter of Reeves*, 48 Hun, 606 ; *Hosack* v. *Rogers*, 9 Pai. Ch. 461 (462–466) ; *Cowles* v. *Thompson*, 1 Redf. 490 ; *Hoes* v. *Halsey*, 2 Dem. 577 ; *St. John* v. *McKee*, 2 Dem. 236 ; *Willson* v. *Willson*, 2 Dem. 462 ; *Chatfield* v. *Hewlett*, 2 Dem. 191 ; *Shields* v. *Sullivan*, 3 Dem. 296 ; *Geissler* v. *Werner*, 3 Dem. 200 ; *Mead* v. *Willoughby*, 4 Dem. 364 ; *Smith* v. *Central Tr. Co.*, 4 Dem. 75 ; *Hall* v. *Dusenbury*, 38 Hun, 125 ; *Close* v. *Shute*, 4 Dem. 546 ; *DeLamater* v. *McCaskie*, 4

§ 328. **Interest.**—When a trustee advances his own money for expenses and payments called for by the trust, he may, in proper cases, be allowed interest, but never in cases where at the time of making such advances he has trust income in hand, not bearing interest. *Cook* v. *Lowry*, 95 N. Y. 103 (115) ; *King* v. *Talbot*, 40 N. Y. 76.

§ 329. **On accounting.**—As to the general principles governing the items credited to a trustee on his accounting, see *ante*, Accounting. See also Resignation ; Renunciation ; Costs ; Release ; Estoppel.

(8) *Renunciation.*

330. **Right to renounce.**—A person named as trustee cannot be vested with an estate against his will. If, before accepting the trust, he renounces, no estate passes to him. *Burritt* v. *Silliman*, 13 N. Y. 93 ; *Matter of Robinson*, 37 N. Y. 261. The execution of the trust then devolves on the Supreme Court, and it is its duty to appoint a person to carry out the trust. If possibly a nominal title vests in the meantime in the trustee it is merely by way of fiction to preserve the trust from failure, and has no other bearing. *Dunning* v. *Ocean Nat. Bank*, 6 Lans. 296 ; aff'd 61 N. Y. 497. See *post*, § 334.

§ 331. **Presumptions.**—If nothing to the contrary is shown, it may be assumed that the person named accepted the trust, and became vested with title. *Dunning* v. *Ocean Nat. Bank*, 61 N. Y. 497 (502) ; *Burritt* v. *Silliman*, 13 N. Y. 93. On the other hand, if he is appointed both as executor and as trustee under a will, and renounces as executor, under the statute, this fact is some evidence of his refusal to act as trustee. *Dunning* v. *Ocean Nat. Bank*, 61 N. Y. 497 (502) ; *Beekman* v. *Bonsor*, 23 N. Y. 298 (304–305).

§ 332. **Form.**—In earlier times, it was the practice to require the renouncing trustee to execute a release to his associate trustees, or to execute a deed of disclaimer. *Dunning* v. *Ocean*

Dem. 549 ; *Matter of Aaron*, 5 Dem. 362 ; *Matter of Cohn*, 5 Dem. 338 ; *Matter of Peyser*, 5 Dem. 244 ; *Binsse* v. *Paige*, 1 Abb. Ct. App. Dec. 138.

Nat. Bank, 61 N. Y. 497 (502) ; *Burritt* v. *Silliman*, 13 N. Y. 93 (96). If he is named as sole trustee, he cannot, of course, release, *Dunning* v. *Ocean Nat. Bank*, *supra*, and even though he have associates, a distinct written disclaimer, acknowledged so as to be capable of being read in evidence without further proof, is sufficient and appropriate ; and need not purport to convey an estate ; *Burritt* v. *Silliman*, 13 N. Y. 93 (97–98) ; and even this formality is not essential, if it clearly appear, that in fact he declined to act ; *Dunning* v. *Ocean Nat. Bank*, 61 N. Y. 497 (502) ; *Beekman* v. *Bonsor*, 23 N. Y. 298 (304–305) ; as, for instance, where he had not accepted the trust, and for more than twenty years omitted to claim the office, and permitted others to perform its duties without challenge. *Matter of Robinson*, 37 N. Y. 261 (263).

§ 333. **When to be made.**—Before the trust instrument goes into effect—that is, before the death of the testator, or the delivery of the trust deed—there is nothing to renounce, and an attempted renunciation is void. *Staunton* v. *Parker*, 19 Hun, 55 (60). And, on the other hand, an attempted renunciation after the trust has once been accepted, and title has vested, comes too late, and is also void. *Thatcher* v. *Candee*, 4 Abb. Ct. App. Dec. 387.

§ 334. **Results.**—If a sole trustee renounces, or if all of several trustees renounce, it has been said that the title vests nominally in them all, and the execution of the trust devolves on the court until it appoints a successor. *King* v. *Donnelly*, 5 Pai. 46. But if any such title vests, it is a mere dry trust ; there is in the meantime no person in whom a right of action on behalf of the trust vests, and therefore the running of the statute of limitations is suspended. *Dunning* v. *Ocean Nat. Bank*, 61 N. Y. 497 (503). If one of two or more trustees renounces, the estate vests in the others ; *Matter of Van Schoonhoven*, 5 Pai. 559 ; *Moir* v. *Brown*, 14 Barb. 39 (45) ; *Burrill* v. *Sheil*, 2 Barb. R. 457 ; with all the powers and duties belonging to all (unless the intention of the creator of the trust appears by the instrument to be otherwise, or is such as to authorize, and the facts are such as to call for, an appointment by the court to fill the vacancy).

Leggett v. *Hunter*, 19 N. Y. 445 (456). If, by the trust instrument, trustees are vested with a discretion, personal to themselves, and not pertaining to any one who should fill their office, and they all renounce (or resign, or are removed, or die, or if for any reason others succeed to their position), the right to exercise the discretion does not pass to their successors, *Beekman* v. *Bonsor*, 23 N. Y. 298, 303, 305, 318 (which is cited merely to this point, and not for its assumption that the discretion there given to the original appointees was *per se* valid) ; if, however, the discretion relied on is not that of the trustees named, but of any one who shall fill their office, it passes to successors. *Fish* v. *Coster*, 28 Hun, 64 (66), aff'd 92 N. Y. 627 ; *Bain* v. *Matteson*, 54 N. Y. 663. See *ante*, § 156, *et seq.*

§ 335. **Retraction.**—The statute provides for retraction of renunciation by an *executor ;* but where a trustee as such, as distinct from the executor, renounces, he may not retract, and can become a trustee only by virtue of a new appointment by the court. *Matter of Van Schoonhoven*, 5 Pai. Ch. 559. But if the trusteeship becomes vacant, and he then applies to be appointed, the court would be inclined to appoint him in pursuance of the expressed desire of the creator of the trust. *Matter of Robinson*, 37 N. Y. 261 (263).

(9) *Resignation.*

§ 336. **Right to resign.**—Where a trustee has not duly renounced, and the title has once vested in him, either as sole trustee or jointly with other trustees, he cannot of his own motion subsequently resign or renounce, and even an attempted conveyance or release by him of all his title to his co-trustee will not divest him of title. He can only be relieved of the trust by the order or decree of a court of competent jurisdiction ; *Brennan* v. *Willson*, 71 N. Y. 502 ; *Thatcher* v. *Candee*, 4 Abb. Ct. App. Dec. 387 ; or, in given cases, in the manner prescribed in the trust instrument. *Cruger* v. *Halliday*, 11 Pai. Ch. 314. And if the trust exists under a general assignment, the fact that he has not given the required bond leaves matters in this condition : title has vested in him, so far that the other trustees cannot convey without him, but as, until bond given, his trust is a mere dry one,

he cannot unite to render a deed sufficient. *Brennan* v. *Willson*, 71 N. Y. 502.

§ 337. **Power of Court.**—The provisions of the Constitution conferring general jurisdiction in equity upon the Supreme Court do not operate as a prohibition on laws conferring similar jurisdiction on the Surrogate's Courts, as, for example, to accept the resignation of a testamentary trustee. *Matter of Bernstein*, 3 Redf. 20. The authority of the Surrogate's Courts is found in § 2814 of the Code, and that of the Supreme Court, apart from the inherent equity jurisdiction, in Real Prop L., § 92.

§ 338. **Grounds.**—It is discretionary with the court whether to entertain or dismiss an application for leave to resign. If it is entertained, it is for the court to determine whether sufficient reasons exist for granting the petition. The following reasons have been made the subject of special comment on such applications: That the trustee's personal interests are inconsistent with his relations to the trust; *Becker* v. *Lawton*, 4 Dem. 341; that he is too busy with his personal affairs; *Baier* v. *Baier*, 4 Dem. 162; that he intends to remove from the United States; *Tilden* v. *Fiske*, 4 Dem. 357. A provision in the trust instrument, bearing on the subject, will be given weight on the question of granting leave to resign; *Tilden* v. *Fiske*, 4 Dem. 357; as will also the fact that the beneficiaries object. *Baier* v. *Baier*, 4 Dem. 162.

§ 339. **Separable trusts.**—Where there are separable trusts, distinctly constituted and established, a trustee of all may be allowed to resign as to some, and continue as to others. *Craig* v. *Craig*, 3 Barb. Ch. 76 (100–101).

§ 340. **Form of proceeding.**—A trustee who applies to the Surrogate's Court for leave to resign must, of course, do so by petition. Under Real Prop. L., § 92, he may proceed by petition or action. Under 1 R. S. 73, § 69, for which this is a substitute, no specific mention was made of an action, but it was held, nevertheless, that an action would lie. *Leggett* v. *Hunter*, 19 N. Y. 445 (460); *Lahey* v. *Kortright*, 132 N. Y. 450 (458).

The question whether a given proceeding is begun by bill or petition has a bearing on the matter of allowances to parties. *Matter of Holden*, 126 N. Y. 589 (591–592). A trustee who procures permission to resign must pay the costs of the petition and of the appointment of a successor. *Matter of Bevier*, 17 Misc. 486 (490); *Matter of Jones*, 4 Sandf. Ch. 615; *Matter of Dixon*, 50 St. Rep. 629. The same rule applies where he is removed. *Id.*

§ 341. Effect on power in trust.—Where the same person is trustee and executor, his resignation and discharge as trustee, and the appointment of a successor as such, do not take from him or give to the successor a power of sale held by him as executor. *Greenland* v. *Waddell*, 116 N. Y. 234 (243). Where a power to sell land is given to several testamentary trustees, as such, and all resign, *it seems* that the successors appointed by the surrogate under § 2818 of the Code succeed to the power (if not personal and confidential in the original ones) although that statute applies to the resignation, etc., of a *sole* trustee. It covers also the case of resignation of several. But in such a case, the Supreme Court can certainly appoint successors who take the power to sell, under its general equity jurisdiction. *Royce* v. *Adams*, 123 N. Y. 402.

§ 342. Invalid trust.—If the trust in question is invalid, there is nothing to resign from, and the court has no jurisdiction in the premises. *Matter of Hall*, 24 Hun, 153.

§ 343. Transfer of title.—An order on the trustee's petition, relieving him from the trust, and directing that he should not interfere further with the same, and appointing a new trustee, with all the original powers; but not requiring the former to convey to the latter, does not, it seems, transfer the legal title to the new trustee. *Culross* v. *Gibbons*, 130 N. Y. 447 (451, 453, 454). A decree relieving the trustee, and appointing a successor, vests the title in the latter upon his receiving a conveyance pursuant to the decree. *Lahey* v. *Kortwright*, 132 N. Y. 450 (454). As to the necessity of a conveyance, see *post*, § 727.

(10) *Removal.*

§ 344. Grounds, in the Supreme Court.—"The Supreme Court has power, subject to the regulations established for the

purpose in the general rules of practice: . . . In an action brought, or on a petition presented, by any person interested in the trust, to remove a trustee who has violated or threatens to violate his trust, or who is insolvent, or whose insolvency is apprehended, or who for any other cause shall be deemed to be an unsuitable person to execute the trust." Real Prop. L., § 92. This section, covering also the provisions as to resignation, does not apply to a trust arising or resulting by implication of law, nor where other provision is specially made by law, for the resignation or removal of a trustee, etc. *Id.* It is only in cases of *express trusts* also, that equity can remove the trustee. *Wood* v. *Brown*, 34 N. Y. 337; *Deraismes* v. *Dunham*, 22 Hun, 86. If there be any other ground for removal of the trustee of an express trust, beyond those covered by the statute, under the inherent jurisdiction of equity, it still exists, under Article VI., § 1, of the Constitution.

§ 345. Grounds, in the Surrogate's Court.—By § 2817 of the Code it is provided that a testamentary trustee may be removed, on petition, in three cases: (1) "Where, if he was named in a will as executor, letters testamentary would not be issued to him, by reason of his personal disqualification or incompetency." (The cases thus referred to are found in § 2612 of the Code, and exist where the executor is "incapable in law of making a contract; under the age of twenty-one years; an alien not an inhabitant of this State; or who shall have been convicted of an infamous crime; or who, on proof, is found by the surrogate to be incompetent to execute the duties of such trust by reason of drunkenness, dishonesty, improvidence or want of understanding. . . . A surrogate, in his discretion, may refuse to grant letters testamentary or of administration to a person unable to read and write the English language." And by § 2638, a person named as executor may not receive letters (unless he gives a bond) where it is objected that his circumstances are such that they do not afford adequate security to the creditors, or persons interested in the estate, for the due administration of the estate; or where it is objected that though a citizen of the United States he is not a resident of this State; as to the latter objection, if a citizen, he may qualify without a bond, *if* he has an office within the State

for the regular transaction of business in person, *and if* the will expressly provides that he may act without giving security. As to these provisions relating to a bond, see §§ 2815, 2816, providing that, on petition, security may also be required by the surrogate from a testamentary trustee "in a case where a person so named as executor can entitle himself to letters testamentary, only by giving a bond; but not otherwise.") (2) "Where, by reason of his having wasted or improperly applied the money or other property in his charge, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the property committed to his charge, or by reason of other misconduct in the execution of his trust, or dishonesty, drunkenness, improvidence, or want of understanding, he is unfit for the due execution of his trust." (3) "Where he has failed to give a bond, as required by a decree, made as prescribed in the last two sections [§§ 2815, 2816]; or has wilfully refused, or without good cause neglected, to obey, a direction of the surrogate, contained in any other decree, or in an order, made as prescribed in this title; or any provision of law, relating to the discharge of his duty."

It accordingly appears that the authority of the Supreme Court is broad enough to include all the cases specified in relation to Surrogate's Courts, even apart from the added force of the legislative declaration embodied in the latter provisions, as to the propriety of removal on such grounds in particular. *Wood* v. *Brown*, 34 N. Y. 337 (341). But possibly it may not be true, conversely, that the authority of removal in the Surrogate's Courts is as broad as that existing in equity. It has, however, been held that the words "misconduct" and "incompetency" in the statute relating to general assignments for creditors were broad enough to confer on the county judge a power of removal for any cause equal to that possessed by a court of equity. *Matter of Cohn*, 78 N. Y. 248.

§ 346. **Illustrations.**—The following grounds have been considered by the courts in connection with applications to remove trustees: moral delinquency, *McMahon* v. *Harrison*, 10 Barb. 659; unnecessary and frivolous litigation; wasteful depletion of the estate, *Matter of McGillivray*, 138 N. Y. 308; gambler,

McMahon v. *Harrison*, 10 Barb. 659 ; bad investments, *Morgan* v. *Morgan*, 3 Dem. 612 ; *Ferris* v. *Ferris*, 2 Dem. 336 ; *Matter of Havemeyer*, 3 App. Div. 519 ; *Matter of Stanton*, 1 Con. 108 ; insolvency, *Morgan* v. *Morgan*, 3 Dem. 612 ; *Van Epps* v. *Van Epps*, 9 Pai. 237 (240) ; negligence, *Fernbacher* v. *Fernbacher*, 4 Dem. 227 ; *Matter of Mechanic's Bank*, 2 Barb. R. 446 ; improvidence, *McGregor* v. *McGregor*, 3 Abb. Ct. App. Dec. 92 ; *Matter of Cady*, 36 Hun, 122, aff'd 103 N. Y. 678 ; lack of understanding, *McGregor* v. *McGregor*, 3 Abb. Ct. App. Dec. 92 ; drunkenness, *Matter of Cady*, 36 Hun, 122, aff'd 103 N. Y. 678 ; friction between trustee and beneficiary, *Deraismes* v. *Dunham*, 22 Hun, 86 (88) ; lack of fidelity, *Matter of Cohn*, 78 N. Y. 248 ; *Matter of Smith*, 2 Con. 152 ; *Matter of Havemeyer*, 3 App. Div. 519 ; *Fernbacher* v. *Fernbacher*, 4 Dem. 227 ; insanity, *Matter of Dearing*, 4 Dem. 81 ; *Matter of Wadsworth*, 2 Barb. Ch. 381 ; *Matter of Worthington*, 141 N. Y. 9 (11) ; friction between co-trustees, *Quackenboss* v. *Southwick*, 41 N. Y. 117 ; *Oliver* v. *Frisbie*, 3 Dem. 22 (27) ; *Deraismes* v. *Dunham*, 22 Hun, 86 ; misuse of funds, *Matter of McGillivray*, 138 N. Y. 308 (313) ; *Matter of Havemeyer*, 3 App. Div. 519 ; *Fleet* v. *Simmons*, 3 Dem. 542 ; *Matter of Wiggins*, 29 Hun, 271 ; *Matter of Stanton*, 1 Con. 108 ; *Fernbacher* v. *Fernbacher*, 4 Dem. 227 ; *Hooley* v. *Gieve*, 9 Abb. N. C. 8 (15) ; non-resident alien, *Lane* v. *Lewis*, 4 Dem. 468 ; ("*alien*, not resident of State," defined, *McGregor* v. *McGregor*, 3 Abb. Ct. App. Dec. 92) ; pecuniary irresponsibility, *Van Epps* v. *Van Epps*, 9 Pai. Ch. 237 (240) ; *Morgan* v. *Morgan*, 3 Dem. 612 ; use of trust funds to secure trustee's sureties, *Fleet* v. *Simmons*, 3 Dem. 542 ; trustee acting as counsel for interests inconsistent with the trust, *Matter of Cohn*, 78 N. Y. 248 ; violation of directions in the will, *Matter of Havemeyer*, 3 App. Div. 519 ; fraud, *Matter of Jacob*, 5 App. Div. 508 ; the fact that the trustee has by wrongful acts placed himself in a position where his interests and those of the trust are antagonistic, *Elias* v. *Schweyer*, 17 Misc. 707 ; the fact that the trustee has voted on stock, a majority in which is held by the trust estate, to make himself an officer and to derive other personal advantages, thereby, under an agreement with the minority, disfranchising in effect the stock held in trust, *Elias* v. *Schweyer*, 17

Misc. 707 (compare *Matter of Elias*, *Id.*, 719, dealing with the nullity of an election thus secured by a trustee); the fact that the trustee makes a personal claim of ownership in the assets, under a contract made between him and testator when the latter's mental capacity was doubtful, and insists upon receiving all benefits thereunder, *Matter of Gleason*, 17 Misc. 510.

§ 347. **When no removal.**—It is not every mistake or neglect of duty or inaccuracy of conduct which will induce courts of equity to remove a trustee. The acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or of proper capacity, or of reasonable fidelity. Thus the mere fact of investments unauthorized by law, and of such a character as to subject the trustee to personal liability in case of loss, does not necessarily draw with it the penalty of removal. *Matter of O'Hara*, 62 Hun, 531 (535); *Morgan* v. *Morgan*, 3 Dem. 612; *Ferris* v. *Ferris*, 2 Dem. 336. For the additional features rendering removal proper, see *Matter of Stanton*, 1 Con. 108. As seen in the statute relating to removal of testamentary trustees, *ante*, § 345, there are certain cases where removal may be avoided by giving a bond. *Morgan* v. *Morgan*, 3 Dem. 612; *Estate of Leavitt*, 28 Abb. N. C. 457.

§ 348. **Form of removal proceedings.**—These may, under the statute, Real Prop. L., § 92, be instituted by petition or by action, *Harrison* v. *U. T. Co.*, 144 N. Y. 326. Concerning the general equity jurisdiction over such proceedings, see *People* v. *Norton*, 9 N. Y. 176 (178); *Lahey* v. *Kortright*, 132 N. Y. 450 (458); jurisdiction of the now extinct superior city courts. *Paget* v. *Stevens*, 143 N. Y. 172. As to *necessary parties*, as petitioners and respondents, in proceedings for removal, consult *Bear* v. *Am. R. T. Co.*, 36 Hun, 400; *Jones* v. *Butler*, 51 N. Y. 658; s. c. (on new trial) 11 Hun, 413; *Sherman* v. *Burnham*, 6 Barb. 404; *Shook* v. *Shook*, 19 Barb. 653; *In re Robinson*, 37 N. Y. 261 (264); *Sortore* v. *Scott*, 6 Lans. 271 (275); *Matter of Livingston*, 34 N. Y. 555 (568–569). *Bill of Particulars.*—The defendant trustee is not entitled to a bill of particulars of the charges against him on points within his own knowledge, especially when they are not known to plaintiff. *Wigand* v. *Dejonge*, 18 Hun, 405.

§ 349. **Remaining trustee as "successor."**—The term "successor" may, in proper cases, include a remaining trustee, in whom the interest previously in the one removed has vested. *Hood* v. *Hayward*, 124 N. Y. 1 (9).

§ 350. **Executor as trustee.**—One acting both as executor and as trustee, in *distinct capacities*, may be removed from one, and continue to act in the other. *Wood* v. *Brown*, 34 N. Y. 337 (342).

§ 351. **Res adjudicata.**—A decree denying removal may be *res adjudicata* so far as a new application is based on facts occurring prior thereto. *Crabb* v. *Young*, 92 N. Y. 56 (65).

§ 352. **Jurisdiction on appeal.**—Where application for removal is made to a surrogate, under §§ 2817–2818, the decision rests in the discretion of the surrogate if there is any evidence to support it; an affirmative decision is reviewable by the Appellate Division, but if there is any evidence to sustain the decision, it is not reviewable in the Court of Appeals. *Matter of McGillivray*, 138 N. Y. 308. An order of the General Term affirming an order of Special Term, reviving against his executors a special proceeding instituted against a discharged trustee, and pending at his death, was *not appealable* to the Court of Appeals. *In re Whittlesey* v. *Hoguet*, 66 N. Y. 358.

§ 353. **Effect of appeal.**—The effect of a decree of removal and appointment of a new trustee is not affected by the pendency of an appeal therefrom. *Matter of Fernbacher*, 17 Abb. N. C. 339; *Stout* v. *Betts*, 74 Hun, 266.

§ 354. **After removal.**—As to a proceeding by beneficiary to compel payment of income received before removal, see *Moorhouse* v. *Hutchinson*, 4 Dem. 362.

§ 355. **Foreign trustee.**—The court here may, in a proper case, and with the parties before it, remove a trustee appointed under the will of a testator who lived in another State and which

has not been proved here. *Jones* v. *Jones*, 8 Misc. 660. See *post*, Chapter XXVI.

§ 356. **Transfer of title.**—As to the necessity of a conveyance, from the trustee removed, to his successor, see *ante*, § 343 ; and *post*, § 727.

CHAPTER IV.

THE BENEFICIARY.

(1) *Who may be a Beneficiary.*

§ 357. **In general.**—Infants, married women, persons of unsound mind, spendthrifts, persons inexperienced in business matters, all those whose interests would presumably be safer in the hands of a trustee than in their own—such are the ones for whom express trusts are usually created.[1] But the beneficiaries of such a trust need not belong to any of these classes. *Leggett* v. *Perkins*, 2 N. Y. 297 (308–309). A valid express trust may be created for the benefit of persons of full age, under no disability, and possessed of capacity to manage their own affairs.

§ 358. **Aliens.**—So, too, the *cestuis que trust* may be aliens. The policy of the law which, except under certain limitations, prohibits aliens from holding title to land, is to have the title in the hands of citizens who owe allegiance to the government and can be called upon to discharge the duties of citizenship. This policy is not violated by devises to citizens, in trust for alien beneficiaries. The citizen trustee takes the title to the land, and pays over to the alien beneficiary the net income, which is personal property. *Marx* v. *McGlynn*, 88 N. Y. 357 (376). See also *Meakings* v. *Cromwell*, 5 N. Y. 136. In *Leggett* v. *Dubois*, 5 Pai. Ch. 114, however, where an alien purchaser, for the purpose of evading the law, took title in the name of a citizen, in trust to pay off a mortgage, etc., out of income if practicable, otherwise from proceeds of a sale, and in such case to turn over the surplus to the alien, there is a dictum to the effect that the State would be entitled to the surplus. With this compare *An-*

[1] See for a history of the successive changes in the statute bearing on this point, *Coster* v. *Lorillard*, 14 Wend. 265 (321 and 330).

stice v. *Brown*, 6 Pai. Ch. 448, where lands were conveyed to a citizen in trust to sell, and pay a debt owing to an alien, and the trust was held valid.

§ 359. **Remainderman as beneficiary.**—Some trusts do, and some do not require an absolute fee in the land in the trustee. *Ante*, § 139. *Bennett* v. *Garlock*, 79 N. Y. 302 ; *Embury* v. *Sheldon*, 68 N. Y. 227 (234) ; *Gilman* v. *Reddington*, 24 N. Y. 9 (15–16) ; *Goebel* v. *Wolf*, 113 N. Y. 405 ; *Matter of Tienken*, 131 N. Y. 391 (401, 404) ; see also *Toms* v. *Williams*, 41 Mich. 552 (566). If they do, no remainder can be limited thereon. *Bennett* v. *Garlock*, 79 N. Y. 302 (320) ; *Briggs* v. *Davis*, 21 N. Y. 574. If they do not, a remainder may be limited, or the estate may be granted or devised subject to the trust, the legal title vesting in the grantee or devisee as against all persons except the trustees and those lawfully claiming under him. Real Prop. L., § 81 ; *Losey* v. *Stanley*, 147 N. Y. 560 ; *Embury* v. *Sheldon*, 68 N. Y. 227 ; *Goebel* v. *Wolf*, 113 N. Y. 405 (413) ; *Gilman* v. *Reddington*, 24 N. Y. 9 (15, 16) ; *Stevenson* v. *Lesley*, 70 N. Y. 512 ; *Matter of Tienken*, 131 N. Y. 391 ; *Genet* v. *Hunt*, 113 N. Y. 158 (172–173) ; see *Townshend* v. *Frommer*, 125 N. Y. 446 (466) ; *Van Camp* v. *Fowler*, 59 Hun, 311, aff'd 133 N. Y. 600. The remainderman, or person vested with the estate subject to the trust, may be the same person who is also beneficiary under the trust. *Embury* v. *Sheldon*, 68 N. Y. 227 (234) ; *Stevenson* v. *Lesley*, 70 N. Y. 512 (516) ; *Asche* v. *Asche*, 113 N. Y. 232 ; *Goebel* v. *Wolf*, 113 N. Y. 405 ; *Strang* v. *Strang*, 4 Redf. 376 (379) ; *Gersen* v. *Rinteln*, 2 Dem. 243 (245). See also remarks of Earl, J., in *Crooke* v. *County of Kings*, 97 N. Y. 421, at p. 447. The present beneficial interest, and the title to the future estate in remainder, in the same person, do not merge. *Asche* v. *Asche*, *supra*. And so also in personal property. See *Warner* v. *Durant*, 76 N. Y. 133 ; *Greer* v. *Chester*, 62 Hun, 329 (332), aff'd 131 N. Y. 629. And instead of having the present estate in the trustee, with a remainder in another, the trust estate may be itself a remainder limited on a precedent estate. *Ante*, § 147. See *Peck* v. *Sherwood*, 56 N. Y. 615 ; *Webster* v. *Morris*, 66 Wis. 366. And the tenant of such preceding estate may be the same person named as beneficiary

under the future trust. See remarks of Earl, J., in *Crooke* v. *County of Kings*, 97 N. Y. 421, at p. 447. So a trust for the life of a beneficiary may exist with power in the beneficiary to dispose by grant or devise of the remainder limited on the trust estate. *Mott* v. *Ackerman*, 92 N. Y. 539; see *Crooke* v. *County of Kings*, 97 N. Y. 421 (434, 447). So, too, subject to the trust term, the beneficiary of the present trust may be a trustee of the remainder for some other person. See remarks of Earl, J., in *Crooke* v. *County of Kings*, 97 N. Y. 421, at p. 447. So during the trust term the beneficiary may become vested with the remainder as the heir, devisee or grantee of the original remainderman, as where, under a trust for A, for life, with remainder to B, B dies, leaving A his only heir. *Asche* v. *Asche*, 113 N. Y. 232 (237); see Real Prop. L., § 83. Undoubtedly a testator, without violating any rule of law, could give an estate to trustees, with directions to collect the income and pay it over to a beneficiary, and upon the death of the latter, the trust to sink into, and become a part of the estate of the beneficiary. But in the case below cited, the court state that "so far as we know, no will, which in express terms has so disposed of property, has been brought to the attention of the courts," and intimate that the fact that such a provision is very unusual militates against such a construction in a case where that intent is not expressed. *Howland* v. *Clendenin*, 134 N. Y. 305 (310). But see *Arcularius* v. *Geisenhainer*, 3 Bradf. 64; *Sweet* v. *Geisenhainer*, *Id.*, 114, aff'd 25 Barb. R., 403. A beneficiary may acquire a future contingent estate expectant upon his own death without issue. *Ham* v. *Van Orden*, 84 N. Y. 257 (269); *Horton* v. *Cantwell*, 108 N. Y. 255 (266).

§ 360. **Beneficiary of one share** may be a remainderman as to another share in the same corpus. *Matter of Van Ness*, 5 Dem. 464.

§ 361. **Reversioner as beneficiary.**—"Where an express trust is created, every legal estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to the person creating the trust, or his heirs." Real Prop. L., § 82. See *Matter of Tienken*, 131 N. Y. 391 (401, 404); *Towns-*

hend v. *Frommer*, 125 N. Y. 446 (455); *Woodgate* v. *Fleet*, 44 N. Y. 1 (18 *et seq.*). It is evident that these heirs might be the same persons who were also beneficiaries under the trust; or they might be the trustees of the trust; or they might be strangers to the trust.

§ 362. **Creator of trust as beneficiary.**—An express trust may be created for the benefit of its creator, and is valid except as to creditors.[1] *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135 (141) and cases there cited. *Ante*, § 115. A vital distinction, however, exists between a transfer of property in trust for the benefit of the creator of the trust, and an absolute transfer to a person who, in consideration thereof, agrees to support the transferrer, or to pay him an annuity, etc. In the latter case, no trust exists. *Ante*, § 30 (*a*). *Hungerford* v. *Cartwright*, 13 Hun, 647; *Gifford* v. *Rising*, 51 Hun, 1; s. c. 55 Hun, 61; the Gifford cases being qualified, but not on this point, by the result of the decision in *Hiles* v. *Fisher*, 144 N. Y. 306, relating to "estates by the entirety."

§ 363. **Corporations.**—Some authorities seem to indicate that a trust to receive and apply income to the use of a corporation might be created for a term of two lives, but this would necessitate such a reading of the statute as to include corporations within the term "person," and at best the nature of a charitable corporation is such that no trust of that kind for its benefit is called for, or serves any purpose, and in case of doubt as between a gift of income, carrying the principle, and a perpetual, and therefore void, trust, the former is preferred. *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135 (147). Compare *Livingston* v. *Gordon*, 84 N. Y. 136; 93 N. Y. 644; *Downing* v. *Marshall*, 23 N. Y. 366. But a corporation may be a beneficiary of a trust to sell, mortgage or lease to pay legacies, etc.; or to sell to pay debts; or under many trusts of personal property, or under a power; except in so far as inability may arise from the terms of its charter, including the statutes affecting its capacity. A charitable corporation may take a devise or bequest on condition that it shall pay cer-

[1] As to which see *post*, § 710; *Gilman* v. *McArdle*, 99 N. Y. 451, 457.

tain annuities created by the will, if only these payments are to be made solely from the income, or, in case of deficiency, from the principal, of the property so devised or bequeathed, and are not to be drawn in any event from its own other property. Although it is not created for the purpose of paying annuities to individuals, it is allowed to take property for its own purposes, and the fact that property so taken is subject to certain deductions merely makes it less valuable, but is not an objectionable feature. The corporation takes less than if the property were unincumbered, but such as it does take, over and above the annuities, it takes for its charter purposes. The effect is the same as if the property were left to others in trust, to pay the income to beneficiaries, with remainder to the corporation. Either method of accomplishing the result may be adopted. *Booth* v. *Bapt. Ch.*, 126 N. Y. 215 (245); *Matter of Howe*, 1 Pai. Ch. 214. *Ante*, § 112 (*b*).

364. After-born children.—A trust may be so framed that children born after the creation of the trust may become beneficiaries thereof. *Woodgate* v. *Fleet*, 64 N. Y. 566 (571); *Haxtun* v. *Corse*, 2 Barb. Ch. 506 (517); *Harrison* v. *Harrison*, 36 N. Y. 543 (546); see *Crooke* v. *County of Kings*, 97 N. Y. 421 (438–439); *Gilman* v. *Reddington*, 24 N. Y. 9 (13, 14, 20). Special provision is made by statute for such cases in trusts for accumulation. Real Prop. L., § 51, subd. 2; 1 R. S. 773, § 3; *Mason* v. *Mason's Ex'rs*, 2 Sandf. Ch. 432, aff'd 2 Barb. R. 229; *Manice* v. *Manice*, 43 N. Y. 303 (376); *Kilpatrick* v. *Johnson*, 15 N. Y. 322 (325); *Haxtun* v. *Corse*, 2 Barb. Ch. 506 (518). See *Gott* v. *Cook*, 7 Pai. Ch. 521, aff'd 24 Wend. 641. The law will not assume that any person is too old to have children born in future. *Miller* v. *Macomb*, 26 Wend. 229 (234); *Taggart* v. *Murray*, 53 N. Y. 233 (239). Gray, Rule against Perpetuities, § 215. A trust to receive and apply income "to A and his heirs," has been construed as a trust to apply the income to A, with remainder in the corpus to A's heirs at his death. *Burtis* v. *Doughty*, 3 Bradf. 287. *Member of religious order.*—So a trust may be created for the benefit of a member of a religious order who has taken a vow of poverty, *Lynch* v. *Loretta*, 4 Dem. 312. *Illegitimate children.*—A trust

may be created for the benefit of illegitimate children. *Gelston* v. *Shields*, 78 N. Y. 275. *Posthumous children.*—Real Prop. L., § 46. See *Id.*, § 292.

(2) *How to be Designated.*

§ 365. **Introductory.**—Down to the year 1893, there was a general rule, applying, with certain special statutory exceptions, to all express trusts, whether created for charitable or other purposes, and governing the degree of definiteness with which the beneficiaries must be designated. In 1893 an act was passed which, so far as concerns dispositions of property for charitable, benevolent, religious and educational uses, changed this rule. That statute, again, which applied to both real and personal property has, so far as concerns real property, been superseded by the provisions of the Real Property Law of 1896. The established general principles will first be considered, regardless of these statutes.

Prior to May 13, 1893.

§ 366. **Designation of beneficiary.**—In every valid express trust there must be a definitely ascertained beneficiary, who can insist on its enforcement. *Read* v. *Williams*, 125 N. Y. 560 (568); *Wilcox* v. *Gilchrist*, 85 Hun, 1 (12); *Prichard* v. *Thompson*, 95 N. Y. 76; *Tilden* v. *Green*, 130 N. Y. 29; *Fairchild* v. *Edson*, 77 Hun, 298; *Gross* v. *Moore*, 68 Hun, 412, aff'd 141 N. Y. 559; *Goddard* v. *Pomeroy*, 36 Barb. R. 546. The same principle applied prior to the Acts above mentioned (§ 365), to devises and bequests in trust for charitable purposes. *Tilden* v. *Green*,[1] 130 N. Y. 29 (45); *People* v. *Powers*, 147 N. Y. 104 (109). Thus, apart from those statutes, the scheme is fatally defective where the beneficiaries are "such incorporated societies organized under the laws of the State of New York or the State of Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable or educational uses" as *the executors might select*, *Prichard* v. *Thompson*, 95 N. Y. 76; or indigent evangelical churches and ministers in the Southern section of the Union, *White* v. *Howard*, 46 N. Y. 144 (163);

[1] For a valuable discussion of the Tilden case, see an article by Professor Ames in 5 Harv. L. Rev. 389.

or such charities as the executors may prefer, *Matter of O'Hara*, 95 N. Y. 403 (418); or where the property was to be disposed of as the executor pleased, but not for his own benefit, *Gross* v. *Moore*, 68 Hun, 412, aff'd 141 N. Y. 559; or for orphan children in general, *Rose* v. *Hatch*, 125 N. Y. 427 (433); or a bequest in trust to purchase shoes for *poor children* attending the parochial schools of St. Paul's R. C. Church, Brooklyn, *Matter of O'Hara*, 95 N. Y. 403 (417); or, to a town in trust in perpetuity for the benefit of the poor of the town, at any rate if not confined to those for whose support the town is under a statutory liability, *Fosdick* v. *Town of Hempstead*, 125 N. Y. 581. So with a devise and bequest to trustees, to procure the incorporation of an institution to maintain a library and promote scientific and educational objects, and to convey to it all or a part of the property, unless for any reason they should deem such a course inexpedient, and in that case to apply it to such charitable, educational or scientific purposes as would in their judgment render it most widely and substantially beneficial to the interests of mankind, *Tilden* v. *Green*, 130 N. Y. 29; or a bequest to such charitable institutions and in such proportions as the executors, by and with the advice of a person named, should choose and designate. *Read* v. *Williams*, 125 N. Y. 560. To the same effect are cases where an instrument purports to create a trust, but names no beneficiary; thus, an antenuptial agreement constituting A the trustee of the real and personal property of B, and giving A the "entire and sole management, direction and control thereof," but naming no beneficiary and expressing no purpose to be carried out, fails to create a valid trust. And the court cannot save it by arbitrarily assuming that it must have been intended that the creator of it should be the beneficiary. *Dillaye* v. *Greenough*, 45 N. Y. 438 (444 *et seq.*); *Wilcox* v. *Gilchrist*, 85 Hun, 1; compare *Hitchcock* v. *Peaslee*, 89 Hun, 506. But if, instead of thus conveying land in trust, and naming no beneficiary and no purpose, one conveys an estate coupled with a power to sell, or do any lawful act, but names no beneficiary or purpose, the latter disposition is valid. The distinction is that in the former case there is a direct disclaimer that the transfer is for the benefit of the transferee; it is *in trust*, but for whom, or for what, is left uncertain; while in the latter case,

the absence of any mention of a third person indicates that the person to whom an estate is conveyed, not in trust, is to exercise the power for his own benefit. *Jennings* v. *Conboy*, 73 N. Y. 230 (234). A further distinction exists in the case of a bequest of personal property to one for life "in trust," followed by a remainder to another. In such a case the fact that the bequest is given "in trust," naming no beneficiary, is not necessarily fatal; for a life tenant of personal property is always, in a sense, a trustee for the remainderman, and so the bequest may be sustained as a beneficial one in the legatee for life, and the words "in trust" be read as referring to his duty of preserving the property for the remainderman. *Hitchcock* v. *Peaslee*, 89 Hun, 506. In any case of trust, or trust power, the beneficiary is duly designated if he can be definitely ascertained by an inspection of the entire instrument. *Kinnier* v. *Rogers*, 42 N. Y. 531 (537). A bequest to executors in trust, "for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, for the repose of my soul and the souls of my family, and also the souls of all others who may be in purgatory," fails to comply with the requirement of an ascertained beneficiary. *Holland* v. *Alcock*, 108 N. Y. 312. It is true that in *Power* v. *Cassidy*, 79 N. Y. 602, the court went so far as to sustain a bequest to executors "to be divided by them among such Roman Catholic charities, institutions, schools, or churches *in the City* of New York," as the majority of the executors should decide upon. That decision was based on the principle that a valid trust power to select and appoint among a class may be given by a trust instrument, if it so defines the class that its members are capable of definite ascertainment by the court, and may insist on the enforcement of the trust, and that equity may enforce the same, or, in default of a selection, may decree an equal distribution among all the beneficiaries. *Holland* v. *Alcock*, 108 N. Y. 312; *Prichard* v. *Thompson*, 95 N. Y. 76 (82); *Read* v. *Williams*, 125 N. Y. 560 (568); *Tilden* v. *Green*, 130 N. Y. 29 (45). Even under that principle a distinction must be drawn between cases where, as in *Power* v. *Cassidy*, the appointment and designation, when once made, is final, the appointees thereupon taking the property once for all, and those where, as in *Fosdick* v. *Town of Hempstead*, 125 N. Y. 581 (592), the bene-

ficiaries were "the poor" of a certain town, and where the trustee has a perpetual right to designate and re-designate, according to personal choice, so that he may give income to A on one day, and refuse to give to him the next week under precisely the same state of facts. How far this latter case would apply to ordinary trusts to receive and apply income to such members of a well-defined class, or such of certain designated individuals, during a legal term, as the tsustee may from time to time deem most needy, may not perhaps be entirely clear. But it is believed that such cases are in their turn clearly distinguishable from that involved in the *Fosdick* case. For in that case, "the poor" of a town constituted, *per se*, a highly indefinite class the membership of which could never be ascertained on any rational basis (unless, perhaps, where the term could be construed, in a given case, to mean those supported, or assisted, by the town, as paupers). It is certainly unobjectionable to provide for the shifting of the use, from one to another, among well-defined beneficiaries, in the discretion of the trustee. And in *Power* v. *Cassidy*, *supra*, stress is laid on the fact that it was quite practicable to ascertain all the institutions, in New York City, of the class described; and it was also true that all answering to the description were interested, and competent, to see to the enforcement of the trust. In *Matter of O'Hara*, 95 N. Y. 403 (418) the court say, however, that the application of the doctrine in *Power* v. *Cassidy* (also explained in *Prichard* v. *Thompson*, 95 N. Y. 76 and in *People* v. *Powers*, 147 N. Y. 104, 111, 112), is to be confined within its own essential limits. And the mere power to designate, select and appoint among an indefinite class does not cure the invalidity. *Holland* v. *Alcock*, 108 N. Y. 312; *Tilden* v. *Green*, 130 N. Y. 29 (45); *Read* v. *Williams*, 125 N. Y. 560 (568–569); *Fairchild* v. *Edson*, 77 Hun, 298.

A careful distinction is to be drawn between a trust proper, to be exercised for indefinite beneficiaries, and a direct devise or bequest to a charitable corporation to be used for all or some of its charter purposes contemplating the benefit of indefinite persons. In the latter case there is no trust. The corporation receives the property as owner. *Bird* v. *Merklee*, 144 N. Y. 544.

The principle that the beneficiaries must be designated does not mean that they must all be specified by name. Indeed, a

trust may be created for the benefit of such persons as may hereafter answer to a given description, *Gilman* v. *Reddington*, 24 N. Y. 9 (13); *Harrison* v. *Harrison*, 36 N. Y. 543; *Woodgate* v. *Fleet*, 64 N. Y. 566 (571); until the persons indicated become ascertainable, there can, of course, as to them, be no trust, and if none become ascertainable during the trust term, the trust fails. But a trust so constructed as to begin, if ever, within the time permitted, for persons who shall within that time answer to a duly definite description, is valid, *Holmes* v. *Mead*, 52 N. Y. 332 (343 *et seq.*); *Shipman* v. *Rollins*, 98 N. Y. 311 (328–329); *Harrison* v. *Harrison*, 36 N. Y. 543. So the fact that both the beneficiary and the trustee are ignorant of the existence, during the term of a prior estate, of the trust in question, is immaterial. *Van Cott* v. *Prentice*, 104 N. Y. 45 (56); *Berly* v. *Taylor*, 5 Hill, 577 (585) and cases there cited. And there is no limit to the allowable number of beneficiaries, *Woodgate* v. *Fleet*, 64 N. Y. 566 (571); *Manice* v. *Manice*, 43 N. Y. 303 (386); *Stevenson* v. *Lesley*, 70 N. Y. 512 (516); and no objection to a shifting succession of beneficiaries, during the legal term of the trust, *Holmes* v. *Mead*, 52 N. Y. 332 (343 *et seq.*). If the beneficiaries of a trust are not designated with sufficient certainty, it is immaterial whether the trust instrument attempts to vest the title to the property in the trustees, or gives to them a mere power in trust. *Tilden* v. *Green*, 130 N. Y. 29 (53–54). And to render a power in trust valid, the same certainty as to the beneficiary must exist as in the case of a trust. *Id.*, p. 65. But an absolute gift to an individual, coupled with a mere request to dispose of it in favor of an indefinite class, if *bona fide* intended to leave him free to do so or not as he chooses, is valid. *Fairchild* v. *Edson*, 77 Hun, 298; *Matter of Keleman*, 126 N. Y. 73. *Ante*, § 36; *post*, § 520, which see also for a later decision in a suit involving the Edson will. An assignment in writing of personal property, to pay the assignor's debts, is a valid express trust, and the particular persons interested as beneficiaries may be ascertained by parol evidence. *Ditmars* v. *Smith*, 3 App. Div. 57.[1]

[1] By L. 1892, ch. 516, applying to cases where a person desires, during his lifetime, to promote public welfare by founding and endowing a public library,

§ 367. **Willingness of trustee to designate.**—The validity or invalidity of a trust does not depend on the competency and willingness of the trustee to carry it out. *Holland* v. *Alcock*, 108 N. Y. 312 (322); *People* v. *Powers*, 147 N. Y. 104 (109); *Tilden* v. *Green*, 130 N. Y. 29. On this point, see Professor Ames's discussion in 5 Harv. L. Rev., 389.

Since May 13, 1893.

§ 368. **Act of 1893.**—By L. 1893, ch. 701, it is provided that: "§ 1. No gift, grant, bequest or devise to religious, educational, charitable or benevolent uses, which shall in other respects be valid under the laws of this State, shall or be [*sic*] deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee, then the title to such lands or property shall vest in the Supreme Court. § 2. The Supreme Court shall have control over gifts, grants, bequests and devises in all cases provided for by section one of this act. The attorney-general shall represent the beneficiaries in all such cases and it shall be his duty to enforce such trusts by proper proceedings in the court."

§ 369. **Act of 1896.**—The Real Property Law, which went into effect October 1st, 1896, did not in terms repeal the statute just quoted, but it contains the following provision which in effect repeals it in so far as it applied to real property: "A conveyance or devise of real property for religious, educational, charitable or benevolent uses, which is in other respects valid, is not

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museum or other educational institution in the State of New York, provision was made for a written conveyance to trustees therein named of real or personal property. The act enumerates the matters that may be designated in the conveyance, gives the trustees power, in the name of the institution, to sue and defend, etc., provides for election of the grantor to manage the property during his own life, etc., and for amendment of the trust, etc., and limits the times within which suits may be maintained to set aside the conveyance, or defences set up involving its validity, etc.

to be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument making such conveyance or devise. If in such instrument, a trustee is named to execute the same, the legal title to the real property granted or devised shall vest in such trustee. If no person is named as trustee, the title to such real property vests in the Supreme Court, and such court shall have control thereof. The attorney-general shall represent the beneficiaries in such cases and enforce such trusts by proper proceedings." Real Prop. L., § 93. The Act of 1893, chap. 701, and § 93 of the Real Property Law are not retroactive. Real Prop. L., § 1; *People* v. *Powers*, 147 N. Y. 104 (109). But in a case where the only reason why a given transfer could be held invalid lies in the fact that trusts for indefinite beneficiaries are contrary to the public policy of this State, these statutes, evincing a change in that policy, would operate to sustain a prior disposition, where no vested rights would be interfered with. *Dammert* v. *Osborn*, 140 N. Y. 30 (43–44); s. c. 141 N. Y. 564. These statutes are more fully discussed *post*, Chapter X.

(3) *Beneficiary of Specific Share.*

§ 370. **Separate funds.**—Where, in accordance with the requirements of the trust instrument, or of the nature of the trust duties and the condition of the estate, a definite fund or parcel is duly set off as the trust share of a given beneficiary, his rights and interests are thereafter centred in that particular property. By its increase in earning power, or in its value if he is to become entitled to the corpus, he benefits; by its depreciation, he suffers. In the fate of the other funds or parcels he has no interest. *Mills* v. *Smith*, 141 N. Y. 256; *Bushnell* v. *Drinker*, 5 Redf. 581; *Wise* v. *Murphy*, 5 Redf. 365; *Freeman* v. *Freeman*, 4 Redf. 211. On the other hand, in the absence of any due and actual setting off, the rights of each beneficiary range over the entire fund. *O' Connor* v. *M. Bank*, 124 N. Y. 324. See further *ante*, §§ 213–217.

(4) *Tenancy.*

§ 371.—The question just considered differs widely from the question whether the trust instrument as such contemplates the

fund as one, or as composed of several distinct shares. This latter question usually arises in connection with an attack on the instrument as involving a suspension of the power of alienation, or of ownership. If the fund is to be held *in solido*, both in fact and in contemplation, during the lives of more than two persons, it is invalid. If it is to be contemplated as consisting of distinct shares, whether actually set apart or not, no particular one of which is to be held in trust for more than two lives, it is valid. The distinction is illustrated in *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135, and cases there cited. Although the terms joint tenancy and tenancy in common are not technically, or at least historically, applicable in strictness to such interests as those held by beneficiaries under an express trust in real property, in New York, which do not give even an equitable title, they are frequently employed to designate the two classes just referred to. If the fund, as such, is to be held in trust, in its entirety, during the trust term, the beneficiaries are said to be joint tenants; if it is to be held in respective portions, even though not actually divided, each for the life of one person, or two persons in succession, the beneficiaries of the trust are said to be tenants in common. *Savage* v. *Burnham*, 17 N. Y. 561 (571); *Delafield* v. *Shipman*, 103 N. Y. 463 (468); *Stevenson* v. *Lesley*, 70 N. Y. 512 (516); *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135 (145). If the meaning of the trust instrument is not clear, the statutory rule that in real property tenancy in common is presumed unless otherwise expressed (Real Prop. L., § 56) applies to the interests of beneficiaries under trusts of real property. *Coster* v. *Lorillard*, 14 Wend. 265 (335, *et seq.*); *Hillyer* v. *Vandewater*, 24 N. E. Rep. 999; s. c. without opinion, 121 N. Y. 681; *Harrison* v. *Harrison*, 36 N. Y. 543; and see *Van Brunt* v. *Van Brunt*, 111 N. Y. 178 (187).[1] Whether the same presumption applies in trusts of personalty was not at first very clear, though the cases seemed to lean in that direction. See *Matter of Lapham*, 37 Hun, 15; *Everitt* v. *Everitt*, 29 N. Y. 39; *Bliven* v. *Seymour*, 88 N. Y. 469 (478); *Mills* v. *Husson*, 140 N. Y. 99 (104); *Matter of Verplanck*, 91 N. Y. 439. But

[1] But "every estate vested in executors or trustees as such shall be held by them in joint tenancy." Real Prop. L. § 56.

the question seems to be positively answered in the affirmative by *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135 (145). And there is also another rule of law, applicable alike to both kinds of property, which has been resorted to to solve the question whether, in the absence of any clear expression in the will, the given trust contemplates the holding of the funds as one, or as several. This is, that as between two fairly possible constructions, the law prefers the one which will sustain rather than the one which will destroy the validity of the instrument. *Mason* v. *Jones*, 2 Barb. R. 229 (242); *Cromwell* v. *Cromwell*, 2 Edw. Ch. 495, aff'd 3 Ch. Sentinel, 7; *Harrison* v. *Harrison*, 36 N. Y. 543; *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135; *Du Bois* v. *Ray*, 35 N. Y. 162 (166); *Post* v. *Hover*, 33 N. Y. 593 (601). As to the limitations of this principle, see *Matter of Kimberly*, 150 N. Y. 90 (94).[1]

(5) *Beneficiary's Rights.*

§ 372.—The rights of the beneficiary find their correlative in the duties and liabilities of the trustee. They are based on the terms of the trust instrument, the special statutes, and the general principles of the law. The particular subject of the beneficiary's assignment or other disposition of his interest—when he may, and when he may not, assign—is, for greater convenience, discussed later on (*post*, Chap. IX.).

(6) *Remedies against the Trustee.*

§ 373. **In general.**—In every case where the trustee misappropriates funds, commits any *devastavit*, or in any way brings, or threatens to bring, loss upon the estate, or impairs the safety of the estate or the full accomplishment of the trust, or neglects the performance of his duties, or uses his position for his own profit or advantage, the beneficiary has some complete remedy, and sometimes a choice among several remedies. Thus, in proper cases, he may require the trustee to account (§ 221 *et seq.*); call for security; secure his removal (§ 344 *et seq.*); hold him liable, on accounting, for damage, or for wrongful personal profits,

[1] The subject of tenancy among trust beneficiaries is more fully discussed in Chaplin Susp. Pow. Aliena, § 170 *et seq.*

or for interest, simple or compound (§ 234 *et seq.*) ; enforce a summary application for payments (§ 254 *et seq.*) ; or have him punished for contempt, by fine or imprisonment (Chap. XXVI.) ; and in general compel the proper execution of the trust and have every unauthorized impairment made good. As to the remedy by injunction, see 2 Perry on Trusts, § 816 ; and the last sentence of this present section. And in proper cases he may also pursue his remedy against the trustee's sureties, if there is a bond. So also in cases discussed below he may trace property which has been improperly diverted from the trust, and recover it. A trust created for the benefit of one person cannot be enforced for the benefit of another ; as where three joint endorsers of a corporation note agreed among themselves that in case of the default of the corporation, each should pay one third of the amount, and each executed a mortgage to a trustee to be foreclosed at the instance and for the benefit of either of the others who should be obliged to pay more than his share. It was held that on default of the corporation, these mortgages could not be enforced for the benefit of the creditors. *Seward* v. *Huntington*, 94 N. Y. 104. In *Petrie* v. *Petrie*, 7 Lans. 90 (97), it was held that if a trustee is insolvent, a beneficiary may maintain an action to restrain him from applying the funds of the estate to the payment of fictitious or outlawed debts, or committing any other breach of trust ; but not if he is solvent. Compare *Butler* v. *Johnson*, 111 N. Y. 204 ; *O'Flynn* v. *Powers*, 136 N. Y. 412 (423).

"A *cestui que trust* is frequently spoken of as an equitable owner of the land. This, though a convenient form of expression, is clearly inaccurate. The trustee is the owner of the land, and, of course, two persons with adverse interests cannot be owners of the same thing. What the *cestui que trust* really owns is the obligation of the trustee ; for an obligation is as truly the subject-matter of property as any physical *res*. The most striking difference between property in a thing and property in an obligation is in the mode of enjoyment. The owner of a house or a horse enjoys the fruits of ownership without the aid of any other person. The only way in which the owner of an obligation can realize his ownership is by compelling its performance by the obligor. Hence, in the one case, the owner is said to have a

right *in rem*, and, in the other, a right *in personam*. In other respects the common rules of property apply equally to ownership of things and ownership of obligations. For example, what may be called the passive rights of ownership are the same in both cases. The general duty resting upon all mankind not to destroy the property of another is as cogent in favor of an obligee as it is in favor of the owner of a horse." Professor Ames, in 1 Harv. L. Rev. 1 (9).

The conception of two owners of the same identical thing at the same time, one recognized at law as the real owner, and the other recognized in equity as the real owner, a conception so frequently encountered in the reports and text-books, has not by any means disappeared in this State, in spite of the statutory declaration, in harmony with the principle stated by Professor Ames, that the beneficiary should have no estate (either at law or in equity,) but merely a right to enforce the performance of the trust. Indeed, the conception of an equitable ownership figures not merely as a matter of phraseology, but as a practical basis for decisions resting entirely upon it. Thus, under the statute providing that in certain cases rents undisposed of shall belong to the person presumptively entitled to the "next eventual estate," it has been held that where there is a trust in M to receive and apply part of the rents for a term, to the use of A for life, and then to apply all the rents to the use of B for life, B was entitled to the "next eventual estate" (*i.e.*, an "equitable estate" as beneficiary), and so should receive, pending the life of A, the portion of the rents undisposed of. *Pray* v. *Hegeman*, 92 N. Y. 508 (519). The strict theory, therefore, cannot be followed out of the window, and accordingly, throughout this book, the usual terms have sometimes been adopted. In reference to the case last cited, it might be said to turn on a mere question of statutory construction, and to hold that the Legislature, by the term "next eventual estate," intended the next eventual right to the benefit, but the court hardly seem to place their decision on that ground. For on page 519 they speak of the beneficial interest in the future trust as "a plain devise of an *equitable life estate* to Austin D. Moore, Jr., in the share given to him, which would carry all the accruing rents and profits." Compare end of § 492, *post*.

Where it is necessary in any proceedings to allege or prove the existence of a trust, as distinguished from a mere indebtedness, the fact that the so-called trustee, in the transaction in question, promised to pay interest on the moneys received, is almost conclusive evidence of a debt. Ames's "Cases on Trusts" (2d ed.), 32, note, and cases there cited. But, as in *Hamer* v. *Sidway*, 124 N. Y. 538, an acknowledgment that a certain fund is held for another "on deposit drawing interest" does not have this effect; the trustee does not agree to pay interest for the use of the money, but says it is set apart and invested, and is earning interest for the beneficiary.[1]

§ 374. **Jurisdiction.**—Even apart from the statutes, equity has general jurisdiction in cases of trust, to supervise the acts of a trustee and protect the beneficiary. N. Y. Constitution, Art. VI., § 1; Bispham on Equity, chap. 11, § 20; 1 Perry on Trusts, § 10. And as between law and equity, the remedy of the beneficiary against a trustee, where the trust is open and continuing, and the accounts of the trustee have not been settled and adjusted and a balance ascertained, is in equity; but where the trust has been closed and settled and a balance ascertained, an action at law will lie, for money had and received, or in other appropriate form. *Van Camp* v. *Searle*, 147 N. Y. 150. By the Code of Civil Procedure, § 2802, *et seq.*, jurisdiction has been conferred on the Surrogates' Courts, in connection with testamentary trusts, and the provisions for various proceedings for accountings, applications for payment of money and delivery of property, *Matter of McCarter*, 94 N. Y. 558 (562); *Tilden* v. *Dows*, 3 Dem. 240; *Beekman* v. *Vanderveer*, 3 Dem. 221; *Moorhouse* v. *Hutchinson*, 4 Dem. 362; right to share in distribution, security, removal, and appointment of successors, etc., are there set forth. And in this connection, it is to be noticed

[1] For discussion of a trust as a contract, the performance of which can be enforced in equity, and the sometimes anomalous feature of the right of the beneficiary, as a third person, to enforce a contract to which, though made for his benefit, he is not a party, see a note in 1 Harv. L. Rev. 200, summarizing a lecture of Professor Ames; *ante*, § 29 *et seq.* and notes; and an article by Professor Bennett, in 9 Harv. L. Rev. 233, and cases there cited, including *Ætna Nat. Bank* v. *Fourth Nat. Bank*, 46 N. Y. 82; *Wheat* v. *Rice*, 97 N. Y. 296; *Garnsey* v. *Rogers*, 47 N. Y. 233.

that the exclusive jurisdiction of equity, which figures as one of the elements in the definition of technical express trusts (*ante*, § 29), has relation not solely to the courts which have succeeded to the general equity powers of the Court of Chancery, but also to any court upon which equitable jurisdiction covering a given case has been conferred. 1 Lewin on Trusts, § 7.

§ 375. **Tracing trust property.**—Where trust property has been unlawfully converted or disposed of, the beneficiary, personally or through a proper representative of the estate, as the case may be, may trace it, or its proceeds, so long as they can be identified, and may recover them until they come into the ownership of a *bona fide* purchaser for value and without notice. *Ferris* v. *Van Vechten*, 73 N. Y. 113 ; *Fowler* v. *B. S. Bank*, 113 N. Y. 450 (455) ; *Matter of Cavin* v. *Gleason*, 105 N. Y. 256 (260) ; *Newton* v. *Porter*, 69 N. Y. 133 ; *Holmes* v. *Gilman*, 138 N. Y. 369 ; *Baker* v. *N. Y. Nat. Exch. Bank*, 100 N. Y. 31 ; *Lockman* v. *Reilly*, 95 N. Y. 64 ; *Gilchrist* v. *Stevenson*, 9 Barb. R. 9 (16) ; *I. & T. N. Bank* v. *Peters*, 123 N. Y. 272 (278) ; *Van Alen* v. *Am. Nat. Bank*, 52 N. Y. 1 ; *Matter of Leonhard*, 86 Hun, 289 (297) ; *Matter of Gilbert*, 39 Hun, 61 ; aff'd 104 N. Y. 200 ; *Matter of Greene*, 2 Con. 166, and cases there cited ; *A. S. R. Co.* v. *Fancher*, 145 N. Y. 552 ; s. c. 2 N. Y. Anno. Cases, 1, p. 10, note ; *Converse* v. *Sickles*, 146 N. Y. 200. Compare *Hatch* v. *National Bank*, 147 N. Y. 184 ; *Warren-Scharf Paving Co.* v. *Dunn*, 8 App. Div. 205. See *Graham* v. *Van Duzer*, 2 Redf. 322. An attempt to follow the trust property does not constitute an election to waive any remedy against the trustee, and if the attempt is unsuccessful, the trustee may still be sued. Both remedies are consistent, and based on the same theory—a breach of trust. *Fowler* v. *B. S. Bank*, 113 N. Y. 450 (455). So the beneficiary may trace the trust property, and proceed directly to secure its restoration to the trust, without first proceeding against the trustee's sureties. *Haddow* v. *Lundy*, 59 N. Y. 320 ; *Flint* v. *Bell*, 27 Hun, 155 (157), aff'd 101 N. Y. 688 ; *Oliver* v. *Piatt*, 3 How. (U. S.) 333 ; *People* v. *American L. & T. Co.*, 2 App. Div. 193 ; *Matter of Leonhard*, 86 Hun, 289 ; *Newton* v. *Porter*, 69 N. Y. 133 ; *Holmes* v. *Gilman*, 138 N. Y. 369 ; *Van Alen* v. *Ameri-*

can Nat. Bank, 52 N. Y. 1; *Baker* v. *N. Y. Nat. Exch. Bank*, 100 N. Y. 31. The beneficiary may, if he so elect, take the substituted property procured by the trustee with the trust funds. *Ferris* v. *Van Vechten*, 73 N. Y. 113. Or he may elect, if the trust fund and the trustee's personal fund have been invested together, to become co-owner with the trustee in the substituted property. *Holmes* v. *Gilman*, 138 N. Y. 369 (378). Or he may hold the trustee personally liable for misappropriation. *Ferris* v. *Van Vechten*, 73 N. Y. 113. The cases cited show that these principles are general in character and not confined to the case of express trusts. On the other hand, in express trusts they may be modified, as to procedure, and parties, by the nature of the trust and the relation of the beneficiary to the title.[1] But in order to succeed in tracing and recovering the trust property or its proceeds, it is essential to clearly prove the identity of the property found, or show that the proceeds of the trust property are invested therein. *Ferris* v. *Van Vechten*, 73 N. Y. 113 (119). The same principle applies, as against other creditors of the trustee, where he has converted the trust funds to his own use and an attempt is made to trace them into a balance to his credit at a bank, or into other property held by him. *Matter of Cavin* v. *Gleason*, 105 N. Y. 256.

§ 376. **Estoppel.**—For a discussion of the principle that in certain cases the beneficiary may be estopped from seeking relief against the trustee for his past acts, see *ante*, § 256.

§ 377. **Right to refunding.**—Legatees may be held liable to restore a trust fund entitled to prior payment, where the payment to them has been made without authority of a decree binding all parties, and there also proves to have been a deficiency of assets to complete the trust fund. *Mills* v. *Smith*, 141 N. Y. 256. Failure to cite parties interested in a certain trust fund, in an accounting by an executor-trustee, does not render distributees liable to refund, where the evidence shows that they were not

[1] For an attempt to trace trust funds into real estate, in the Surrogate's Court, and then to use his decree, in an action for partition of the land, as establishing legal title in the claimants, see *Side* v. *Brenneman*, 7 App. Div. 273.

paid from that fund, but that it was afterward wasted by the executor-trustee. *Mills* v. *Smith*, 141 N. Y. 256. Where an executor-trustee accounts before the surrogate, and his accounts are settled, showing in his hands a certain trust fund, and subsequently there is a *devastavit*, and no trust fund remains, the person entitled to receive that fund absolutely cannot require the residuary legatees who have received the rest of the estate to refund. As between him and them there is no cause of action. His remedy is against the executor. This was a case where the only evidence went to show that the trust fund was not used to pay the residuary legatees, but was held distinct, and was wasted by the executor-trustee. This rule applies though neither plaintiff nor his predecessor, interested in the trust fund, was cited on the accounting. This defect, in the absence of a showing that the residuary legatees received his fund, merely left the executor-trustee unprotected by the accounting, as against the plaintiff. *Mills* v. *Smith*, 141 N. Y. 256. And on the general subject of refunding, see also *Matter of Lang*, 144 N. Y. 275 ; *Petrie* v. *Petrie*, 7 Lans. 90 (95). Where commissions are allowed or paid by beneficiaries or successors, but the payment or allowance is induced by fraud or duress, and is not voluntary, they may be recovered back. *Scholey* v. *Mumford*, 60 N. Y. 498 ; s. c. 64 N. Y. 521. But if parties voluntarily elect to adjust a disputed claim of commissions, and there is no fraud or duress, the commissions cannot be recovered back. *Hurlburt* v. *Durant*, 88 N. Y. 121 (128) ; *Hancox* v. *Meeker*, 95 N. Y. 528 (538).[1]

[1] As to the principle governing the jurisdiction of the Surrogate's Court, where there has been an overpayment to a legatee, and the executor, on accounting, seeks an affirmative decree against the legatee, and in his own favor, for the excess, see *Matter of Underhill*, 117 N. Y. 471 ; compare *Matter of Hodgman*, 140 N. Y. 421 (431).

CHAPTER V.

THE TRUST PROPERTY.

§ 378. **May be any property.**—There is no restriction upon the form of property that may be held in trust. Anything that is capable of ownership, and of transfer at all, may be transferred and held in trust. Code C. P., § 1910. Bishop on Insolvent Debtors, p. 173, *et seq.* There are, however, certain rights capable of possession but not of transfer, on the ground that an assignment of them would be contrary to public policy; *e.g.*, a trustee cannot assign his right to unaccrued commissions (*ante*, § 317). Other illustrations are given in 1 Perry on Trusts, § 69. Apart from such exceptions, the property assigned may consist in a mere equitable title. It may be an equity, over and above a mortgage, or may be charged with the payment of debts or legacies, *Scott* v. *Stebbins*, 91 N. Y. 605, and is of course subject to existing rights of creditors in fraud of whom it may have been transferred in trust, or to the payment of testator's debts in so far as it may be needed after his other property first liable may prove insufficient.[1] *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135.

§ 379. **Real property.**—The usual subject of real property trusts is a present estate. But future estates may be transferred in trust; the owner of land may vest a future estate in a trustee, *Peck* v. *Sherwood*, 56 N. Y. 615. *Ante*, § 147. And land may

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[1] A general gift of the entire income of personal property, or of the rents and profits of real property, may be equivalent to a general gift of the property itself. This rule is controlled by the expressed or implied intent of the donor, and such intent may be evidenced by the fact of his giving the property itself to others in the same instrument, and by other indications. *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135 (146); *Patterson* v. *Ellis*, 11 Wend. 298; *Smith* v. *Post*, 2 Edw. Ch. 526; *Hatch* v. *Bassett*, 52 N. Y. 359 (362). See particularly *Matter of Smith*, 131 N. Y. 239.

be devised on a trust to arise upon a future contingency. See *Reed* v. *Underhill*, 12 Barb. R. 113 (116–117); *Winthrop* v. *McKim*, 51 How. Pr. 323, aff'd 66 N. Y. 625. And a remainderman may create a trust in his remainder, to vest in possession in the trustee at the termination of the precedent estate. *King* v. *Whaley*, 59 Barb. R. 71 (77).

§ 380. **Personal property.**—Money is a frequent subject of disposition in trust. The trust corpus may also consist in a policy of insurance on the life of a third party, *Matson* v. *Abbey*, 70 Hun, 475, aff'd 141 N. Y. 179; *Smillie* v. *Quinn*, 90 N. Y. 492; or on the life of the creator of the trust, see *Butler* v. *State M. L. A. Co.*, 55 Hun, 296, aff'd 125 N. Y. 769, see *Johnston* v. *Smith*, 25 Hun, 171; or a contingent interest under a policy, *Hirsh* v. *Auer*, 146 N. Y. 13 (19); or a bond and mortgage executed by a third party, and held by the creator of the trust, and assigned or bequeathed by him to the trustee, *Van Epps* v. *Van Epps*, 9 Pai. Ch. 237; *Tobias* v. *Mayor*, 17 Hun, 534; *Cornell* v. *Cornell*, 96 N. Y. 108. Or the owner of real property, for the purpose of creating a trust, may convey it to a third party, and take back a mortgage to himself as trustee for designated persons; in such case, the land belongs to the grantee, subject to the mortgage, and the grantor holds the mortgage in trust, *McPherson* v. *Rollins*, 107 N. Y. 316; *Kirsch* v. *Tozier*, 143 N. Y. 390, if so intended, *Beeman* v. *Beeman*, 88 Hun, 14; *Coleman* v. *Hiler*, 85 Hun, 547; *Buffalo Cement Co.* v. *McNaughton*, 90 Hun, 74; *Kelsey* v. *Cooley*, 11 N. Y. Supp. 745; *Townsend* v. *Rackham*, 143 N. Y. 516. Compare *ante*, pp. 14, 15, 50, 66; and *ante*, § 186. For further illustrations of mortgages as trust corpus, see *Ettlinger* v. *P. R. & C. Co.*, 142 N. Y. 189; *Matter of Mechanics' Bank*, 2 Barb. R. 446; *Nearpass* v. *Newman*, 106 N. Y. 47; *Brink* v. *Layton*, 2 Redf. 79; *Brown* v. *Harris*, 25 Barb. R. 134; *ante*, § 186. So with a fractional interest in a bond and mortgage, *Downing* v. *Marshall*, 23 N. Y. 366 (371). So with chattel mortgages. *Zeiter* v. *Bowman*, 6 Barb. R. 133. And an assignment to a trustee carries the equity in a chattel mortgage previously given by the assignor. *Kitchen* v. *Lowery*, 127 N. Y. 53. As to indemnity claims against a foreign government, see *Taft* v. *Marsily*, 120 N. Y.

474 ; benefit certificates, *Matter of Palmer*, 3 Dem. 129 ; contracts for the payment of money, *Cummins* v. *Barkalow*, 1 Abb. Ct. App. Dec. 479 (485) ; book accounts, *Ditmars* v. *Smith*, 3 App. Div. 57 ; part of a debt, *Chambers* v. *Lancaster*, 3 App. Div. 215 (216) ; patent right, *Barnes* v. *Morgan*, 3 Hun, 703 ; 4 Abb. N. C. 67, note ; bonds, *Gilchrist* v. *Stevenson*, 9 Barb. R. 9 ; judgments, *Woodruff* v. *Boyden*, 3 Abb. N. C. 29 ; any choses in action, *Wade* v. *Holbrook*, 2 Redf. 378, see Code C. P., § 1910 ; proceeds to be derived from a future sale of land under a power, and then to be held in trust, *ante*, § 150. A contingent remainder consisting in the balance, if any, of personal property which may be left unconsumed by a third party, a life tenant, may be included, as a future interest, in a present gift to a trustee. *House* v. *Raymond*, 3 Hun, 44 (49). A deed of trust by one of "all his property, real and personal," to a trustee, to manage for his benefit during his life, with power to sell, and pay the proceeds to the creator of the trust, does not presumably include such property as the assignor's watch, his wearing apparel, and a portrait of himself. It is not to be supposed that he intended to have such articles sold. *Hill* v. *Heermans*, 6 Hun, 661. As to a lease held by testator as tenant, see *Miller* v. *Knox*, 48 N. Y. 232. As to a trust in *income*, while the corpus is vested in the beneficiary, see *Onondaga T. & D. Co.* v. *Price*, 87 N. Y. 542 (547). The trust corpus may consist in the lien of testator's estate upon testator's firm business and property, *Bell* v. *Hepworth*, 134 N. Y. 442 (449), or of patents, trade secrets, and copyrights, 1 Perry on Trusts, § 67. For many other illustrations, see *ante*, § 82, *et seq.* Stock certificates may be held in trust, and though they stand in the individual name of the trustee, evidence may, at his death, be given to show the trust, as in *Guion* v. *Williams*, 7 N. Y. Supp. 786, 55 Hun, 605, aff'd 125 N. Y. 768.[1]

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[1] In addition to the cases on trusts in savings bank deposits, cited *ante*, § 87, see *Markey* v. *Markey*, 13 N. Y. Supp. 925, where deposit "in trust" for another, and delivery of the book, failed to create either a trust or a gift because none was intended.

For an excellent statement of the essential features of a perfected gift of sealed obligations and mercantile specialties, by delivery of deed of gift or

§ 381. **Estimating its value.**—Under the statute (L. 1860, ch. 360) providing that no person having a husband, wife, child or parent shall bequeath or devise to any charitable, etc., corporation, etc., more than one half of his net estate, the rule is settled that if he give a life estate, followed by a bequest or devise of the remainder to charity, the question of whether he has violated the statute is determined by ascertaining the cash value, at his death, of the life estate, according to the life tables, and comparing the result with the then cash value of the remainder. *Hollis* v. *Drew Theological Seminary*, 95 N. Y. 166 (compare *Matter of Teed*, 59 Hun, 63 ; 76 Hun, 567). But if there is a power, in the trustee of the life estate or other life tenant, or any one, or, in the case of personal property, a trust, to sell and apply the corpus, so far as necessary, to the use of the life tenant, or life beneficiary, it has been held that this rule cannot be applied, and that therefore the computation must be deferred until, at the termination of the life estate, it can be ascertained as a matter of fact what portion of the estate has gone to the life tenant. *Rich* v. *Tiffany*, 2 App. Div. 25. It might have seemed that as the gift to charity is either valid or invalid at testator's death, and as it is then invalid only if it does then exceed one half, the burden should be thrown upon the contestant to show the invalidity as of that date. Compare *Matter of Davis*, 149 N. Y. 539.

§ 382. **Transfer tax.**—Concerning the application of the Taxable Transfer Act and the statutes which it replaced upon transfers of real property and personal property respectively, see *Matter of Swift*, 137 N. Y. 77 ; *Matter of James*, 144 N. Y. 6. As to their bearing upon the case of non-resident transferrors,

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delivery of the document, the transfer passing title to the physical instrument and carrying an irrevocable power of attorney to the donee to collect, in the name of the obligee, but for his own use, see note in 5 Harv. L. Rev., 35 ; also Professor Ames' notes in his "Cases on Trusts" (2d ed.), pp. 140, 145, 156, 162.

For a case of a gift of chattels by present words of gift the parties being present at the place where the chattels were, the situation being practically identical with that in the cases summarized, *ante*, p. 44, see *Kilpin* v. *Ratley* (1892), 1 Q. B. 582.

see *Matter of James*, 144 N. Y. 6; *Matter of Houdayer*, 150 N. Y. 37; *Matter of Phipps*, 77 Hun, 325; aff'd 143 N. Y. 641; *Matter of Whiting*, 150 N. Y. 27; *Matter of Bronson*, 150 N. Y. 1. As to the bearing of the general tax laws upon securities held in trust, as affected by the non-residence of trustees or beneficiaries, or the fact that the property is not within the State, see *People ex rel. Day* v. *Barker*, 135 N. Y. 656; *People ex rel. Darrow* v. *Coleman*, 119 N. Y. 137. In general, see also the following: *Matter of Davis*, 149 N. Y. 539; *Matter of Morgan*, 150 N. Y. 35; *People ex rel. Gould* v. *Barker*, 150 N. Y. 52; *Matter of Ogsbury*, 7 App. Div. 71; *Matter of Green*, 7 App. Div. 339. The fact that a trustee deposits his own funds, together with trust funds, in his name "as trustee," does not relieve his estate, on his death, from the imposition of a transfer tax upon the amount of his own funds thus deposited, which, while in principle a debt owing to him, as trustee, by the bank, practically constitute, in relation to the transfer tax, his own property, or represent an interest in property. *Matter of Houdayer*, 150 N. Y. 37 (41). "A deed of trust, executed February 14th, 1889, provided that the trustee named therein should hold certain securities and apply their income to the use of the grantor as long as she should live, and after her death that he should divide the securities equally among her nieces, and also contained the following proviso: 'Provided, however, that this instrument may, at any time, be modified or vacated by an instrument in writing to be executed by me and by the said trustee, or his successor or successors.' Under this latter clause the instrument was subsequently slightly modified. The grantor died on the 21st day of May, 1893. [It was] Held, that the property which passed under the trust deed was not subject to the transfer tax imposed by ch. 399 of the Laws of 1892; that the transfer became effective at once upon the execution of the deed and the delivery of the securities, and that the donees mentioned in the instrument took a vested interest, liable only to be defeated by their failure to survive the donor or by modifications which might be agreed upon, during the term of the trust, between the trustee and the grantor; that there was no power of revocation reserved, as the power to revoke or modify expressly required the assent of both the donor and the donee; that the

transfer was in the nature of a gift *inter vivos* and was not taxable." (Head note, *Matter of Green*, 7 App. Div. 339, which cites *Matter of Seaman*, 147 N. Y. 69 ; *Estate of David*, Surr. Dec. (N. Y. Co.) 1895, 263). See also *Matter of Ogsbury*, 7 App. Div. 71.

CHAPTER VI.

THE TRUST TERM.

§ 383. **General principle.**—There is no statute providing specifically the term for which a trust may be created to continue, except (1) in the case of trusts for accumulation, as to which see *post*, §§ 405, 406 ; (2) in the case of trusts to receive and apply rents to the use of a person "during the life of that person, or for any shorter term," as to which see *post*, § 394 ; (3) in the case of trusts for the benefit of creditors, which cease after twenty-five years, unless otherwise provided by the trust instrument or especially prescribed by law ; Real Prop. L., § 90 ; and (4) that every express trust ceases when its purpose ceases. Real Prop. L., § 89. (5) The only other statutes bearing on this subject are those which deal with suspension of the power of alienation, or of ownership, beyond a specified term. These latter, therefore, apply in any event only to such trusts as involve suspension ; but all other trusts may be created without reference to any designated term, save for the exceptions just enumerated.[1] The two points here to be considered, therefore, are, first, the nature of suspension, and the restrictions imposed on it ; and secondly, the distinction between the trusts that do, and those that do not, involve suspension. The subject of suspension, which can be properly discussed only in its full relation to future contingencies as well as trusts, has been examined in detail elsewhere (Chaplin on Susp. Pow. Aliena.). In this chapter, the general principles are set forth, with leading illustrations. In taking up the subject, it must first be noticed that the recent revision, which went into effect October 1st, 1896, made some radical changes which might appear, at least on their face, to alter the

[1] "The absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee." Real Prop. L , § 39.

established theory of suspension as effected by trusts. The former and the present statutes will, therefore, be quoted and compared.

§ 384. **The former statutes.**—The former revision provided, in respect to real property, that "Every future estate shall be void in its creation which shall suspend the absolute power of alienation for a longer period than is prescribed in this article. Such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed." 1 R. S. 723, § 14. "The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section" (as to which see *post*, § 392). *Id.*, § 15.

§ 385. **The present statute.**—The foregoing provisions were repealed by the Real Property Law, which has substituted therefor the following provisions in respect to real property:

"The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except" (as to the exception, see *post*, § 392) . . . "For the purposes of this section a minority is deemed a part of a life and not an absolute term equal to the possible duration of such minority." Real Prop. L., § 32.

§ 386. **Statutes compared.**—The definition of suspension, *i.e.*, that it exists "when there are no persons in being by whom an absolute fee in possession can be conveyed," is the same, under the former and the present law. Now nothing was better settled than that there were two methods (disregarding powers, which do not in reality constitute a distinct class) of so disposing of property that there should not be persons in being by whom an absolute fee in possession could be conveyed, namely by *either*

creating certain future estates, *or* creating certain express trusts. The revisers of 1830, in their notes, announced that only the former of these methods could effect suspension, for they say that "An estate is never inalienable unless there is a contingent remainder, and the contingency has not yet occurred. This is the meaning of the law prohibiting perpetuities, and is the effect of the definition in § 14." (5 Stat. at Large (Edmonds), Appendix, 307.) This view obtained, at first, some support from the courts, *Kane* v. *Gott*, 24 Wend. at 662; and opinion of McCoun, V. C., *Lorillard* v. *Coster*, 5 Pai. at 188, *et seq.*, but was finally overthrown, and the law was clearly established that estates may be rendered inalienable either by certain contingencies, or by certain express trusts. See *Kane* v. *Gott*, 24 Wend. at 662. Also opinion of Nelson, Ch. J., in *Hawley* v. *James*, 16 Wend. at 121; and *Coster* v. *Lorillard*, 14 Wend. at 305–306; s. c. 5 Pai. 218, 222, *et seq.*; *Radley* v. *Kuhn*, 97 N. Y. 26 (34); *Robert* v. *Corning*, 89 N. Y. 225 (235); *Smith* v. *Edwards*, 88 N. Y. 92 (102, *et seq.*); *Leonard* v. *Burr*, 18 N. Y. 96 (107); *Craig* v. *Hone*, 2 Edw. Ch. 554, 564.

The reason for this conclusion is very plain. For as to contingent estates, there are two classes, one of which does, and one of which does not, involve suspension. "A future estate . . . is contingent while (1) the person to whom, or (2) the event on which, it is limited to take effect remains uncertain." Real Prop. L., § 30. Now if the only uncertainty lies in the event, and it is certain who is to take the estate *if* the event happens, it creates no suspension. For "An expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession." Real Prop. L. § 47. And if all the persons are ascertained who can in *any* event take the expectant estate, they can, by all uniting with the owner of the present estate, convey an absolute fee in possession. The *power* is not suspended.[1] On the other hand, if there is such uncertainty as to the persons, that it cannot be said that it must, in every event, go to some one or more of a number of living and ascertained persons, then, obviously, there is an interest as yet unrepresented, and consequently it is impossible to effect an absolute conveyance of the

[1] See Chaplin, Susp. Pow. Aliena., § 64, *et seq.*

fee in possession. For example, if a future estate in fee is limited to A, *if* A outlives the precedent estate, otherwise to B, A and B between them represent every future interest, and if they and the life tenant unite, they can convey an absolute fee. The power is not suspended. But if a future estate is limited to such children of A (an unmarried man) as may be living at the termination of the precedent estate, and if none, then to B, it cannot be said, till that time comes, who is to take the remainder. The power is suspended.[1] So much for contingent estates.

As to express trusts, there are also two classes, one of which does, and one which does not, effect suspension. For where the trust (for example, a trust to sell land for the benefit of creditors) is not such as to stand in the way of an outright sale of the real property at any time, either by the trustee, or the trustee and others acting together, or of a release of the debts, by the creditors, there is, *ex vi termini*, no suspension of the absolute power of alienation. But on the other hand there are trusts (*e.g.*, a trust merely to receive and apply rents and profits) the very purpose and essence of which is that the land shall not be alienated by the trustee during the term, *Radley* v. *Kuhn*, 97 N. Y. at p. 31; *Robert* v. *Corning*, 89 N. Y. at p. 335; and where, consequently, a sale by him would be in direct contravention of the trust, and as to such the statute provides that where the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee, in contravention of the trust, shall be absolutely void, Real Prop. L., § 85; and also that "the right of a beneficiary, of an express trust to receive the rents and profits of real property and apply them to the use of any person, cannot be transferred by assignment or otherwise." *Id.*, § 83. In such a case, though all interests, present and future, are represented by living and designated persons, "there are no persons in being by whom an absolute fee in possession can be conveyed." *Everitt* v. *Everitt*, 29 N. Y. 39 (90); *Radley* v. *Kuhn*, 97 N. Y. 26 (34); *Robert* v. *Corning*, 89 N. Y. 225 (235); *Smith* v. *Edwards*, 88 N. Y. 92 (102); *Leonard* v. *Burr*, 18 N. Y. 96 (107).

[1] The same principle applies, though a future estate is vested, but defeasibly, so that it may be divested in favor of persons as yet unascertained. *Cochrane* v. *Schell*, 140 N. Y. 516 (539).

Such then were the principles affecting suspension under the Revised Statutes: (1) A definition of suspension, as existing whenever there are no persons in being by whom an absolute fee in possession can be conveyed; (2) a *general prohibition* of such suspension (except within specified limits) by any limitation or condition whatever; (3) the principle that suspension might be effected either (in the nature of things) by a contingent estate given to unascertained persons, or (by virtue of the statutes) by an express trust under which the trustee was forbidden to sell, and the beneficiary was forbidden to assign. For in both cases was found the inability to convey—in the one case in the nature of the contingency affecting the person who should take the future estate, and in the other in the statutory prohibition of sales of an estate, even though held by and for ascertained persons.

But the revisers of 1896 have omitted entirely the general prohibition against suspension, on which this entire system hinged. For in place of the old statutes: "The absolute power of alienation *shall not be suspended* by *any limitation or condition whatever*, for a longer period," etc. (referring both to trusts and contingencies); and "every future estate shall be void in its creation which shall suspend the absolute power of alienation for a longer period," etc. (referring solely to suspension effected by a contingency, and dealing with the fate of the future estate which produces that result,—the present revisers have substituted the following only: "Every future estate shall be void in its creation, *which* shall suspend the absolute power of alienation, *by* any limitation or condition whatever, for a longer period," etc. This deals solely with suspension effected by future estates. The words "any limitation or condition whatever," which formerly constituted a part of the abolished general prohibition, now relate only to future estates. It is difficult to perceive what purpose the revisers of 1896 had in mind. If they had intended to revert to the original intention of the former revisers, that nothing but future contingent estates should effect a suspension (see *ante*, p. 274), they could hardly have phrased these sections better. For example, under this theory, land might be devised to twenty trustees, to receive and apply the rents and profits to fifty beneficiaries, all those living at any given time to succeed to the beneficial rights of those who died; with a vested remain-

der to others in fee. See Chaplin, Susp. Pow. Aliena., §§ 360–366.

It seems inevitable, therefore, that the new statute (if to be read according to its express terms) in confining its prohibition to suspension caused by future estates, either (1) leaves express trusts without any prescribed term within which they must cease, or (2) proceeds on some theory that a present vested estate held in trust to receive and apply rents, is, or involves, some kind of a future and contingent estate; that this contingent estate is what causes the trust to effect suspension; and that thereby it falls within the provision that "every future estate shall be void in its creation which shall suspend the absolute power of alienation" beyond two lives, etc. Now there can be no doubt that the estate of the trustee is present, and vested. The only thing that is in any sense *future* is the beneficiary's right to the rents as they shall from time to time become due and payable. Whether this can be called a future estate seems to be the question. "A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time." Real Prop. L., § 27. The right of the beneficiary hardly seems to fall within this definition. A further statute, Real Prop. L., § 50 (and on this, perhaps, the revisers of 1896 relied), provides that "A disposition of the rents and profits of real property to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in this article, for future estates in real property." As to this section, it is reproduced from the Revised Statutes (1 R. S. 725, § 36). It has not received much attention from the courts, and its purpose is somewhat obscure. One thing, however, seems perfectly clear. If it applies at all to the case of rents and profits under trusts to receive and apply them, and so renders them subject to the rules for future estates, it does not render them *contingent;* and it is only when future estates are contingent or defeasible by a contingent estate or possibility that they effect suspension. The "estate" of the beneficiary of such a trust, in the future rents and profits of real estate, is not contingent or defeasible, for neither the person to whom nor the event on

which it is limited to take effect remains uncertain. Real Prop. L., § 30. Furthermore, this very question has (in another connection) been discussed by the Court of Appeals. The case arose under the statute now embodied in Real Prop. L., § 53, which provides that "when, *in consequence* of a valid limitation of an *expectant estate*, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate." It is to be noticed that the section just quoted applies only where the suspension is caused by an expectant estate. It was argued that it does not apply to express trusts to receive and apply rents and profits, because such a trust does not involve any expectant estate; and the court say: "This construction of the statute seems to be the natural construction according to the ordinary meaning of the language." (On this point see *post*, § 489, *et seq.*) The court held the statute just quoted applicable in that case, because there was also a future estate which, though vested, was defeasible in favor of unascertained persons, a fact which caused a suspension. *Cochrane* v. *Schell*, 140 N. Y. 516 (538–539). The statutory change above discussed presents many difficulties, which can only be laid at rest when they are brought before the Court of Appeals. Mr. Birdseye (R. S., 2d ed., note to Real Prop. L., § 32) takes the view that the present section does not vary materially from its predecessor. But as a mere matter of plain grammatical construction the difference is wide. It is no doubt highly probable that the courts will endeavor to find some means of construing the statute so as to avoid a change in the law.[1]

§ 387. **Personal property.**—"The absolute ownership of personal property shall not be suspended by any limitation or condi-

[1] The opinion in *Sanford* v. *Goodell*, 82 Hun, 369, fails to discriminate between *vesting* and *alienability*. The theory on which it proceeds is erroneous, though it might, perhaps, be sustained on another ground. But the estates and interests there involved were all alienable, and the various parties could have united and conveyed an absolute fee. There was, therefore, no suspension. See *Sawyer* v. *Cubby*, 146 N. Y. 192; *Murphy* v. *Whitney*, 140 N. Y. 541 (546); *Bailey* v. *Bailey*, 97 N. Y. 460.

tion whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator." 1 R. S. 773, § 1. "In all other respects, limitations of future or contingent interests in personal property shall be subject to the rules prescribed in the first chapter of this act [*i.e.*, 1 R. S. 718–750, now repealed and replaced by the Real Property Law of 1896] in relation to future estates in lands." *Id.* Trusts of personal property, where, by analogy to the trusts of real property, neither the trustee nor the beneficiary can sell or release, suspend the absolute ownership of personal property. *Genet* v. *Hunt*, 113 N. Y. 158 (168). But if there are persons in being who, among them, have absolute ownership, and can by uniting, transfer the property and free it and its proceeds from the trust, there is no suspension. *Sawyer* v. *Cubby*, 146 N. Y. 192; *Murphy* v. *Whitney*, 140 N. Y. 541; *Montignani* v. *Blade*, 145 N. Y. 111; *Williams* v. *Montgomery*, 148 N. Y. 519 (525); *ante*, p. 278, note; Chaplin, Susp. Pow. Aliena., Chap. VII.

§ 388. **Powers.**—This subject is considered, *post*, Chap. XXII.

§ 389. **The statutory period.**—The period during which the statute allows suspension of the absolute power of alienation is "two lives in being at the creation of the estate" (Real Prop. L., § 32), with a single exception applicable solely to real property. (*Post*, § 392.)

§ 390. **"The creation of the estate."**—Where an expectant estate is created by grant, the delivery of the grant, and where it is created by devise, the death of the testator, shall be deemed the time of the creation of the estate." Real Prop. L., § 54. "A grant takes effect, so as to vest the estate or interest intended to be conveyed, only from its delivery; and all the rules of law, now in force, in respect to the delivery of deeds, apply to grants hereafter executed." Real Prop. L., § 209. And the validity of a testamentary disposition is to be determined by the facts as

they exist at the testator's death. For example, if the will creates a trust for the lives of testator's *three* children, and before testator's death one of them dies, the trust then going into effect is valid. *Lang* v. *Ropke*, 5 Sandf. R. 363 ; *Griffen* v. *Ford*, 1 Bosw. 123 (137) ; *Tallman* v. *Tallman*, 3 Misc. 465 (473) *et seq.* ; *Lang* v. *Wilbraham*, 2 Duer, 175 ; *Dubois* v. *Ray*, 7 Bosw. 300 ; *Oxley* v. *Lane*, 35 N. Y. 340 (344, 346) ; *Hosea* v. *Jacobs*, 98 Mass. 65 ; Lewis, " Perpetuities," 27 ; Gray, " Rule against Perpetuities," § 231 ; 4 Kent Comm. (12th ed.) 283, note 1, citing numerous English authorities. *Contra*, *Odell* v. *Youngs*, 64 How. Pr. 56.

§ 391. **Two lives in being.**—(A detailed examination of this subject will be found in Chaplin, Susp. Pow. Aliena.). In all cases (with one exception, *post*, § 392) the suspension must be bounded strictly by two lives. *Henderson* v. *Henderson*, 113 N. Y. 1. The instrument must be so drawn that the suspension not only *may*, but inevitably *must*, so terminate. *Schettler* v. *Smith*, 41 N. Y. 328 (334 *et seq.*) ; *Henderson* v. *Henderson*, 113 N. Y. 1 (14, 15) ; compare *Purdy* v. *Hayt*, 92 N. Y. 446 (457). Part of a life, *e.g.*, a minority, counts for a life ; *Benedict* v. *Webb*, 98 N. Y. 460 (466). Real Prop. L., § 32. The lives designated must be lives of persons *in being* at the creation of the estate. Thus, a designation of the " wife" or " widow" of an unmarried person will not answer, for he might marry a person not now in being. *Schettler* v. *Smith*, 41 N. Y. 328 ; *Van Brunt* v. *Van Brunt*, 111 N. Y. 178 ; *Durfee* v. *Pomeroy*, 7 App. Div. 431. Although a term of suspension must be measured by a life or two lives in being, yet there is no objection to employing any other measures, so long as they cannot extend the term beyond two designated lives. *Phelps' Ex'r* v. *Pond*, 23 N. Y. 69 ; *Oxley* v. *Lane*, 35 N. Y. 340 (345, 357). And so it is unobjectionable to create a trust to last until many lives have ended, if only no particular portion of the trust estate is tied up for more than two lives, as where a trust is created to divide the property into ten shares, and hold each share in trust during two lives respectively, *Stevenson* v. *Lesley*, 70 N. Y. 512 ; *Meserole* v. *Meserole*, 1 Hun, 66 ; *Savage* v. *Burnham*, 17 N. Y. 561 (570). *Allen* v. *Allen*, 149 N. Y. 280.

The lives selected to measure the term may be those of any persons, whether trustees, beneficiaries, or third parties. *Bailey* v. *Bailey*, 97 N. Y. 460 (467), except that trusts to accumulate must be created for the sole benefit of an infant, and must begin during its minority and end at or before its majority, Real Prop. L., § 51 ; 1 R. S. 773, § 3 ; but they may be created for the benefit even of an unborn child, to go into operation during its minority and within the duration of any two designated lives in being at the original creation of the estate. *Id.* And in case of real property only, trusts may exist after the lapse of two lives, in one case, *post*, § 392.

§ 392. **Beyond two lives.**—" A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age." Real Prop. L., § 32. See *post*, § 404 *et seq.* ; § 413. This provision relates exclusively to real property. (Compare Real Prop. L., § 51, with 1 R. S. 773, § 3.)

CHAPTER VII.

THE TRUST PURPOSE.

(1) *Real Property.*

§ 393. **Introductory.**—In their notes, the revisers of 1830 say: "As the creation of trusts is always in a greater or less degree the source of inconvenience and expense, by embarrassing the title, and requiring the frequent aid of a court of equity, it is desirable that express trusts should be limited as far as possible, and the purposes for which they may be created strictly defined. The object of the revisers in this section is to allow the creation of express trusts, in those cases and in those cases only where the purposes of the trust require that the legal estate should pass to the trustees. . . . After much reflection, the revisers have not been able to satisfy themselves that there are any cases not enumerated in this section [1 R. S. 728, § 55; Real Prop. L., § 76], in which, in order to secure the execution of the trust, it is necessary that the title or possession should vest in the trustees. Where no such necessity exists (as where the trust is to convey, or to make partitions, etc.), it is obvious that without giving any estate to the trustees, the trust may as well be executed as a power." Accordingly, the Real Property Law of 1896, following in substance the provisions of the Revised Statutes, provides that "Uses and trusts concerning real property, except as authorized and modified by this article, have been abolished" (§ 71) and also (*id.*, § 73) that the preceding sections of the Article shall not prevent or affect the creation of such express trusts, as are thereinafter authorized and defined; and also (§ 76) that

§ 394. **The four classes.**—"An express trust may be created for one or more [the Revised Statutes said 'any or either'] of the following purposes:

"1. To sell real property for the benefit of creditors;

"2. To sell, mortgage, or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;

"3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto;

"4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits prescribed by law." Real Prop. L., § 76.[1]

Except for one or more of these four purposes, an express trust in real property cannot be created. *Syracuse Savings Bank* v. *Holden*, 105 N. Y. 415 (418); *Follett* v. *Badeau*, 26 Hun, 253 (256). But still, the statute includes, within its terms, an indefinite number of particular and special trusts, and the creator of the trust may specify a particular purpose within the class, or create a general trust and leave much to the discretion of the trustee. *Leggett* v. *Perkins*, 2 N. Y. 297 (310–311). And the purpose contemplated may be gathered from the entire instrument. *Kinnier* v. *Rogers*, 42 N. Y. 531 (537).

§ 395. **Certain features in common.**—One consideration which applies to all four classes relates to the question whether the Legislature, in adopting the Revised Statutes, abolished all trusts and simultaneously created four classes which should be permitted; or abolished all trusts except these four, leaving them standing, within their defined limits. The importance of the answer lies chiefly in the fact that under the latter view the principles previously established and applicable to such trusts would still apply, and the earlier English and New York cases would still be binding; while under the former view, the courts would have a freer hand to construe the statute, and determine the incidents of these trusts *de novo*. The doctrine on this subject is set forth in *Leggett* v. *Perkins*, 2 N. Y. 297 (307), where Gardiner, J., says: "The statute in reference to express trusts is mere-

[1] An ante-nuptial deed of trust is restricted like all others, within these classes. *Campbell* v. *Low*, 9 Barb. R. 585.

ly permissive. It creates nothing. The Legislature did not first annul all trusts and then proceed to a new creation. They abolished all except certain ones which they recognize as existing. The trusts preserved have their foundation in the common law, and their effect is to be determined by common law principles. Except that the statute restricts the purposes for which express trusts may be created, the authority of the donee is as absolute now as before the statute." When, for example, a trust of the third class is now created, "it is recognized as existing with all its common law incidents. The relation of the donor and trustee, the power of the former and the duty of the latter, are precisely what they were by the common law." But trusts of that class are now affected by the provision against assignment by the beneficiary (*id.*, p. 327, dissenting opinion). So it has been held that the right to make a general assignment for the benefit of creditors is not a creation of statute, but is regulated and modified by statute. *Boese* v. *King*, 78 N. Y. 471 (478); *Thrasher* v. *Bentley*, 59 N. Y. 649, opinion given in 1 Abb. N. C. 39 (44); *People* v. *Chalmers*, 1 Hun, 683, aff'd 60 N. Y. 154. Narrower in view are the remarks of Bronson, J., in *Hawley* v. *James*, 16 Wend. 60 (148), where he says: "To give effect to the statute, in the spirit in which it was enacted, we must, as far as practicable, eradicate from our minds all that we have learned in relation to the doctrine of trusts as they existed before the late revision and read the statute as though the particular kinds of express trusts which it specified were now for the first time authorized by law. We may resort to the common law for definitions and rules of construction, where the statute itself is deficient. But in attempting to ascertain whether any particular trust can now be created, we cannot resort to the common law, for the obvious reason that this light has been extinguished by the Legislature." For further general discussion of the relation of the statute to the preceding law, compare *Downing* v. *Marshall*, 23 N. Y. 366 (377 *et seq.*); *Yates* v. *Yates*, 9 Barb. R. 324; *Campbell* v. *Low*, 9 Barb. R. 585 (589).

As to retroactive effect of the statute, the first section of the Real Property Law declares that: "This chapter does not alter or impair any vested estate, interest, or right, nor alter or affect the construction of any conveyance, will, or other instrument

which has taken effect at any time before this chapter becomes a law ;" *e.g.*, the power of a beneficiary in a trust created before the Revised Statutes, to alien, was plainly a right reserved from their operation. *Dyett* v. *C. T. Co.*, 140 N. Y. 54 (65). Other cases relating to retroactive effect are : *Anderson* v. *Mather*, 44 N. Y. 249 (258) ; *Matter of Dekay*, 4 Pai. Ch. 403 ; *DePeyster* v. *Clendining*, 8 Pai. Ch. 295 (304), aff'd 26 Wend. 21 ; *Jauncey* v. *Rutherford*, 9 Pai. Ch. 273 (275) ; *Bellinger* v. *Shafer*, 2 Sandf. Ch. 293 (296) ; *Stagg* v. *Beekman*, 2 Edw. Ch. 89 (91) ; *Aspinwall* v. *Pirnie*, 4 Edw. Ch. 410 ; *Ogden* v. *Smith*, 2 Pai. Ch. 195 ; *Champlin* v. *Haight*, 7 Hill, 245 ; *Green* v. *Dikeman*, 18 Barb. R. 535 ; *Stewart* v. *McMartin*, 5 Barb. R. 438 (442) ; *Welch* v. *Allen*, 21 Wend. 147 ; *Bishop* v. *Bishop*, 4 Hill, 138 ; *Salmon* v. *Stuyvesant*, 16 Wend. 320 (324) ; *Root* v. *Stuyvesant*, 18 Wend. 257 ; *Savage* v. *Burnham*, 17 N. Y. 561. For illustrations of trust schemes which would have been valid if created before the statute, but which were by it rendered invalid for the future, see *Hawley* v. *James*, 16 Wend. 60 (113) ; *Coster* v. *Lorillard*, 14 Wend. 265 ; *Chwatal* v. *Schreiner*, 148 N. Y. 683.

§ 396. **The receipt of rents.**—The subject of the receipt of rents, in its bearing on all four classes of express trusts, has been considered *ante*, § 146.

(*a*) *The First Class.*

§ 397. **To sell real property** for the benefit of creditors.—A general assignment for the benefit of creditors, in so far as it applies to land, falls within the first class, *Heermans* v. *Robertson*, 64 N. Y. 332 (342) ; *Bennett* v. *Goble*, 43 Hun, 354 ; *Kip* v. *Hirsh*, 103 N. Y. 565 (571–572) ; *Hubbell* v. *Medbury*, 53 N. Y. 98 ; *Wagner* v. *Hodge*, 34 Hun, 524, aff'd 98 N. Y. 654 ; *Flint* v. *Bell*, 27 Hun, 155, aff'd 101 N. Y. 688 ; as does a special assignment of part of the grantor's property, to pay some of his debts. *Knapp* v. *McGowan*, 96 N. Y. 75 (85). But in view of the fact that general assignments are also regulated by another statute relating specially thereto, and constitute a branch of law by themselves, and that they have already received (Bishop on Insolvent Debtors) elaborate and exhaustive treat-

ment, they will not be treated here. Only such authorities bearing on them are referred to as bear also on all trusts of the first class.[1]

The "creditors" referred to in the subdivision of Real Prop. L., § 76, relating to the first class of trusts are only such as represent debts already *contracted* when the trust goes into effect. *Rome Exchange Bank* v. *Eames*, 4 Abb. Ct. App. Dec. 83 (90 *et seq.*); *Youngs* v. *Youngs*, 53 N. Y. 613. The trust to sell must be absolute and imperative, without discretion in the trustee except as to time and manner of sale. *Henderson* v. *Henderson*, 113 N. Y. 1 (11); *Cooke* v. *Platt*, 98 N. Y. 35; *Steinhardt* v. *Cunningham*, 130 N. Y. 292 (300). And the direction to sell must be the sole, or at least the primary purpose of the grant. *Woerz* v. *Rademacher*, 120 N. Y. 62; *Cooke* v. *Platt*, 98 N. Y. 35 (38, 39). See *Henderson* v. *Henderson*, 113 N. Y. 1 (11). Such a trust covers all the property transferred to the trustee, although only a part of it will be required to pay the debts. *Bennett* v. *Garlock*, 79 N. Y. 302 (318). Differing from trusts to receive and apply income, which are limited to a term measured by lives (see *ante*, § 389), and therefore necessarily involve a remainder over, vested or contingent, or a reversion in the grantor or in the testator's heirs, trusts to sell involve a fee in the trustee. It is true that even in such a case the creator of the trust may declare to whom the lands to which the trust relates shall belong, in the event of the failure or termination of the trust, or may grant or devise the lands subject to the execu-

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[1] As to what is, and what is not a *general* assignment, see *Royer Wheel Co.* v. *Fielding*, 101 N. Y. 504 (509); *Tiemeyer* v. *Turnquist*, 85 N. Y. 516 (522); *Hine* v. *Bowe*, 114 N. Y. 350; *Matter of Gordon*, 49 Hun, 370 (372) and cases there cited; see 22 Abb. N. C. 339, note; *Watts* v. *Shipman*, 21 Hun, 598; *Hayden* v. *Wellington*, 63 Fed. Rep. 6. Such general assignments cannot be revoked by the act of the assignor alone. Bishop on Insolvent Debtors, 3d ed., §§ 284, 285. Concerning the effect on general assignments, of federal bankruptcy statutes, see *Thrasher* v. *Bentley*, 59 N. Y. 649 (opinion given in 1 Abb. N. C. 39); *Boese* v. *King*, 78 N. Y. 471 (477); *Haas* v. *O'Brien*, 66 N. Y. 597; *Mayer* v. *Hellman*, 91 U. S. 496; *Bostwick* v. *Burnett*, 74 N. Y. 317; *Colie* v. *Jamison*, 4 Hun, 284 (286); *Matter of Backer*, 2 Abb. N. C. 379; *Ludington's Petition*, 5 Abb. N. C. 307 (319); *Havemeyer* v. *Loeb*, 5 Abb. N. C. 338; *Matter of Straus*, 9 Abb. N. C. 131; *Matter of Stowell*, 16 Abb. N. C. 90; *Von Hein* v. *Elkus*, 8 Hun, 516.

tion of the trust; and that such a grantee or devisee thereby acquires "a legal estate in the property, as against all persons, except the trustees, and those lawfully claiming under *him*" (*sic*, formerly *them*). But in the case of express trusts to sell, where the trustee takes the whole fee, this power or right of the creator does not constitute an estate in himself; no title or interest remains in him; there is nothing, for example, to which the lien of a judgment could attach. *People* v. *Bacon*, 99 N. Y. 275, 279. The fact that the creator of the trust may discharge the trust by paying off the debts which the trust was created to satisfy; or that he may become entitled to a residue remaining unsold after the debts are discharged, does not give him a reversionary interest to which a judgment against him can attach. His right is merely an equitable one, and in no sense impairs or diminishes the estate of the assignee, which remains perfect and exclusive until the purposes of the trust have in fact been accomplished. *Id.* Even if the creator of the trust afterward conveys or devises, the grantees or devisees take no title whatever, legal or equitable, as against the trustee. *Briggs* v. *Davis*, 21 N. Y. 574. The question of just when this complete title in fee ceases, and title vests beneficially in others, may sometimes be a perplexing question. By statute (Real Prop. L., § 90) a trust to pay debts ceases at the expiration of twenty-five years unless otherwise provided. Apart from the statute, the expiration of the trust may in certain cases be presumed. *Kip* v. *Hirsh*, 103 N. Y. 565. If, as may happen, there is a trust to sell and pay debts, and hold any unsold portions or surplus proceeds on a further trust to receive and apply rents and income, it might be peculiarly difficult to say just when the title in fee required by the first trust shifts into an estate for life, under the second trust, so as to furnish opportunity for the vesting of a reversion or remainder, for the present title is in the same trustees under both trusts. Apparently the fact that all the debts had at a given period been paid might be shown. The death of the trustee leaving the trust unexecuted does not give any new rights to the creator of the trust. *Merritt* v. *Scott*, 3 Hun, 657. As to the effect of the transfer of title to a trustee under an express trust to sell, upon an easement in adjoining land which was to continue only so long as the creator of the trust should continue

to own the land in question, consult *Colie* v. *Jamison*, 4 Hun, 284.

A trust to sell and pay over the proceeds to the grantor is invalid as a trust, as not within any of the four classes. *Heermans* v. *Burt*, 78 N. Y. 259 (267), see 64 N. Y. 332. A trustee to sell is the trustee of such only of the creditors as choose to accept him as such. The trust being valid, his title is good as against all the creditors, but they are free if they choose to enforce their claims against any property of the debtor not validly conveyed to the trustee. *Warner* v. *Jaffray*, 96 N. Y. 248 (254 *et seq.*). But such property as is validly transferred to the trustees cannot be reached by any of the creditors, by proceedings based on disregard of the trust, even though the trust is not general, but is for the benefit of certain creditors only. *Rogers Locomotive, etc., Works* v. *Kelley*, 88 N. Y. 234 (239).

If, under a trust of the first class, the beneficiaries (*i.e.*, the creditors of the creator of the trust) release their claims against him in consideration of his releasing to the trustee all his reversionary interests in the subject of the trust, the trust itself thereupon ceases. For there are no longer any debts to be paid, to furnish the basis of a trust. The beneficiaries cannot create a new trust for distribution, as that is not one of the purposes for which an express trust in land is permitted. The result is that the title vests in the beneficiaries as tenants in common. *Selden* v. *Vermilya*, 3 N. Y. 525 (533 *et seq.*). A beneficiary under a trust of the first or second class may assign his claim. But in such case, if he agrees to remain liable for its collection, he may still maintain an action to compel an accounting. *Pendergast* v. *Greenfield*, 127 N. Y. 23. And in any case where it is necessary for a creditor, under a trust to pay debts, to take proceedings to enforce the trust, or to protect the property from unlawful interference, he is not required to first prove his debt by action at law. *Spelman* v. *Freedman*, 130 N. Y. 421 (426).

If a purchaser from a trustee to sell has noticed that the trustee is making the sale for personal ends, and in fraud of the trust, and with a view of defrauding the beneficiaries, the latter may reach the same in his hands. *Flint* v. *Bell*, 27 Hun, 155, aff'd 101 N. Y. 688, and cases there cited. So in the case of a reconveyance by the trustee to the creator of the trust, before

the trust is completely executed, and a conveyance by the creator to another. *Briggs* v. *Davis*, 20 N. Y. 15, corrected 21 N. Y. 574.

The creator of a trust to sell waives any defence of usury against a creditor made a beneficiary of the trust, and it cannot be set up by the trustee. *Chapin* v. *Thompson*, 89 N. Y. 270. As to a trust to sell and pay outlawed debts, see *Hale* v. *Stewart*, 7 Hun, 591. Under a trust to pay debts, a beneficiary (*i.e.*, a creditor) who holds collateral securing his claim in part, may nevertheless prove and secure a *pro rata* dividend on his entire claim, and is not confined to a dividend on the unsecured balance. Otherwise, the unsecured creditors would share in the benefit of the collateral. *People* v. *Remington*, 121 N. Y. 328.

(b) The Second Class.

§ 398. **To sell, mortgage or lease real property,** for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon. Real Prop. L., § 76, modifying the prior wording by inserting the words "annuitants or other." This provides for three methods and two purposes, to all of which certain principles apply.

§ 399. **In general.**—If an attempted trust to sell, mortgage or lease is not validly constituted, the land may remain in, or pass to, those otherwise entitled, subject to a power to be executed for those purposes. *Steinhardt* v. *Cunningham*, 130 N. Y. 292. *Post*, § 515 *et seq.* As to when the court will imply the essentials requisite to a valid trust to sell, mortgage or lease, see *Steinhardt* v. *Cunningham*, 130 N. Y. 292. Trusts of this class being only for the benefit of annuitants or other legatees, or to satisfy any *charge* on the land, there can be no valid trust to mortgage or lease land for the benefit of creditors at large, whose claims are not a charge on the land. Such creditors are to be protected only by a trust of the first class "to sell real property for the benefit of creditors." *Darling* v. *Rogers*, 22 Wend. 483 (498); *Hawley* v. *James*, 16 Wend. 60 (149); *Irving* v. *DeKay*, 9 Pai. Ch. 521 (529). The two classes may be combined, however, and as a trust to sell, so far as method goes, is common to both, a trust to sell and mortgage, to pay debts some of which are, and some of which are not, charged on the land, will be construed

thus: the trust to sell may be exercised for the benefit of all the creditors, whether their claims are or are not charged; the trust to mortgage may be exercised to satisfy mortgages, judgments and other charges. *Id.* Where there is a trust to sell, but none to mortgage, yet if the trustee acquires *other* land, by foreclosure of a mortgage, or by unauthorized investment of proceeds of sale, etc., as to such land he has the legal title and can give a good mortgage, this property being regarded throughout as personalty. *McLean* v. *Ladd*, 66 Hun, 341. A trust of the second class must, in order to be valid, not merely in terms authorize a sale, mortgage or lease for the statutory purpose, but such must also be in fact its actual and *bona fide* purpose. *Heermans* v. *Burt*, 78 N. Y. 259 (265), see 64 N. Y. 332. A trust of this second class gives no title in the land to the beneficiary, and he cannot quit-claim it, but may assign his equitable right to enforce the trust. *Duvall* v. *E. E. L. Church*, etc., 53 N. Y. 500. If an annuitant of a legacy charged on land becomes vested with the title to the land, even for life, the lien is lost in the title. *Clark* v. *Clark*, 147 N. Y. 639 (645). The scheme of the statute is in the direction of such a construction as will vest the title in the heirs or devisees rather than the executors, and permits the working out of the wishes of the testator, when legal, under a trust power. The court will not needlessly strain after a construction that will declare a trust. *Steinhardt* v. *Cunningham*, 130 N. Y. 292 (300). If the trust is to sell, mortgage or lease to pay off a mortgage on the land, and also to receive and use the rents received, for the same purpose, it is held in *Matter of Fisher*, 4 Misc. 46, that as to the rents this is a trust for accumulation, and so invalid because not for an authorized purpose.

A trust to lease, mortgage or sell, if invalid, in a given case, as to one of these methods, may nevertheless be valid as to the others. *Haxtun* v. *Corse*, 2 Barb. Ch. 506 (519); *Harrison* v. *Harrison*, 36 N. Y. 543 (548); *Post* v. *Hover*, 33 N. Y. 593 (598). It seems to follow quite obviously that a trust of this second class may by its terms authorize the trustee to sell only, or to mortgage only, or to lease only.

§ 400. **To sell.**—The cases already cited under the First Class, § 397, apply here, except as to the purpose for which the sale is

to be made. A trust to sell land and pay the proceeds to another falls under this class, the proceeds being a legacy. *Duvall* v. *E. E. L. Church*, etc., 53 N. Y. 500. So with a trust to sell and divide the proceeds. *Savage* v. *Burnham*, 17 N. Y. 561 (567); *Hamlin* v. *Osgood*, 1 Redf. 409. But there cannot be a valid express trust to partition land. *Hawley* v. *James*, 16 Wend. 60 (149). Where there is a bequest and devise in trust for the payment of certain legacies, with discretionary power to sell for that purpose, and the legacies fail even in part so that the personalty will suffice to pay them, a sale of the realty becomes unnecessary and the court will not in such a case imply a *trust* of the second class, vesting title in the trustee. *Chamberlain* v. *Taylor*, 105 N. Y. 185 (191, 193).

§ 401. **To mortgage.**—The fact that a testator directs the ultimate division, among devisees in remainder, of the net proceeds to be raised by mortgage on the devised lands, by trustees appointed to effect the mortgage, does not make the trust one to mortgage "for the benefit of legatees." It is no benefit to the devisees to receive money raised by mortgage out of their own property. *Weeks* v. *Cornwell*, 104 N. Y. 325 (328, 329, 338). While the statute of trusts does not authorize a trust to mortgage land to raise money to pay debts other than those charged on the land, it contains nothing which prevents a debtor, or the grantee of a debtor, in pursuance of a prior oral understanding, entered into at the time of the execution of the conveyance to him, from executing a mortgage to secure the payment of specific debts. *Royer Wheel Co.* v. *Fielding*, 101 N. Y. 504 (509). In such a case, where in fact the debtor unnecessarily joins with his grantee in executing the mortgage, which is given to a creditor for the benefit of himself and other specified creditors, and which provides that on foreclosure sale, and after payment of these debts, the overplus shall be returned to the mortgagors, the legal effect is that such overplus would pass to the other creditors. Such a provision, therefore, does not avoid the mortgage. *Royer Wheel Co.* v. *Fielding*, 101 N. Y. 504 (510). Where a trustee as such gives a mortgage, it is unnecessary on foreclosure to allege the facts showing that he was in fact a duly constituted trustee. *Skelton* v. *Scott*, 18 Hun, 375; *Kingsland* v. *Stokes*, 25 Hun,

107. As to necessary allegations where the trustee is plaintiff, see *Secor* v. *Pendleton*, 47 Hun, 281.

§ 402. **To lease.**—The whole subject of leasing, under the several classes of express trusts, is considered *post*, § 453 *et seq.* The question whether a trustee of the second class can make a lease which may extend beyond the term of the trust, and be binding on the future owners of the land, is different in character from that raised on the same point under the third class. See *post*, § 455 *et seq.* For here the trustee necessarily has the fee. *Bennett* v. *Garlock*, 79 N. Y. 302 (317 *et seq.*).

(*c*) *The Third Class.*

§ 403. **To receive rents and profits** and apply them to the use of beneficiaries. This class, in common with others, involves receipt of rents, and, as distinguished from the others, the application of rents to the use of the beneficiary as its chief purpose. The consideration of the entire subject of rents—what they are; the distinction between rents and income, and corpus; their apportionment; the deductions to be made from gross rents and income; the method of apportioning deductions, and the time from which and to which rents and income are computed—inasmuch as it is not confined in its application to one class of trusts, will be taken up later. (Chap. VIII.) And as these topics naturally precede the subject of the application of rents and income, the consideration of that subject, although it relates only to this third class, will also be deferred. (See § 471 *et seq.*)

(*d*) *The Fourth Class.*

§ 404. **To receive and accumulate rents and profits of real property.**[1]—The fourth subdivision of § 76 of the Real Property Law, in defining trusts of this fourth class, *ante*, § 394, permits them "for the purposes, and within the limits prescribed by law." As to the general statutes relating to suspension, see Chap. VII. The purposes and limits of trusts for accumulation in particular are set forth in the following statutes.

[1] As to a new and special provision for accumulation of unexpended or undistributed interest, when the trustee is a trust company, see the Banking Law (L. 1892, ch. 689, § 160; and Birdseye's R. S., 2d ed., p. 230, § 160, note).

§ 405. **Real property.**—" All directions for the accumulation of the rents and profits of real property, except such as are allowed by statute, shall be void. An accumulation of rents and profits of real property, for the benefit of one or more persons, may be directed by any will or deed[1] sufficient to pass real property as follows :

" 1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority.

" 2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it must commence within the time permitted, by the provisions of this article, for the vesting of future estates, and during the minority of the beneficiaries, and shall terminate at or before the expiration of such minority.

" 3. If in either case such direction be for a longer term than during the minority of the beneficiaries, it shall be void only as to the time beyond such minority." Real Prop. L., § 51.

" Where such rents and profits are directed to be accumulated for the benefit of a minor entitled to the expectant estate, and such minor is destitute of other sufficient means of support and education, the Supreme Court, at a special term, or, if such accumulation has been directed by will, the Surrogate's Court of the county in which such will has been admitted to probate, may, on the application of his general or testamentary guardian, direct a suitable sum out of such rents and profits to be applied to his maintenance or education." Real Prop. L., § 52. For the statute regulating accumulation of the income of personal property, see *post*, § 413.

When Accumulations must Begin.

§ 406.—(1) The first provision is that they may be directed to commence either on the creation of the estate or subsequently.

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[1] Notice, for its bearing on *Id.*, § 208, which has omitted the words " and sealed" which were found in the section for which it is substituted, that this section retains the word " deed," a term implying a seal. 2 Blackst. Comm. 295, 305.

In either event they must commence during the minority of the beneficiaries for whom the accumulation is directed. But according as the directions of any given instrument fall under one or the other of these two classes, the succeeding provisions applicable to it vary somewhat. So far as concerns the present examination concerning the time when the term must begin, the first of these two classes, namely, that consisting of trusts beginning at the creation of the estate out of which the rents and profits to be accumulated are to arise, presents no peculiarity. In the second class, namely, that consisting of trusts to commence subsequent to the creation of the estate, the accumulation must begin within the time permitted for the vesting of future estates. This latter provision should be carefully noted. The time thus referred to is to be found set forth in §§ 32–37, 39, 40, 50 of the Real Property Law. This, with a single exception (*ante*, § 392) is *two lives* in being. A future estate is permitted to vest *at the end*, or *immediately upon the termination*, of two lives. Therefore, an accumulation may begin in certain cases *at the end*, or *immediately upon the termination*, of two lives. This is particularly noteworthy from the fact that in the case of accumulations of personal property a nice distinction between the statutory expressions has led to a different rule, which will be stated elsewhere. *Post*, § 413 *et seq.* See *Manice* v. *Manice*, 43 N. Y. 303 (382). (2) Under subdivision 2 of § 51, relating to accumulations, the persons for whose benefit accumulation is directed need not be in being at testator's death. *Mason* v. *Mason's Executors*, 2 Sandf. Ch. 432, aff'd 2 Barb. R. 229 ; *Manice* v. *Manice*, 43 N. Y. 303 (376). See *Gott* v. *Cook*, 7 Pai. Ch. 521. But they must be in being at the time for commencement of the accumulation. *Manice* v. *Manice*, 43 N. Y. 303 (376) ; (see *Gott* v. *Cook*, 7 Pai. Ch. 521) ; *Kilpatrick* v. *Johnson*, 15 N. Y. 322 (325). And accumulation for an unborn child can never begin before its birth. *Manice* v. *Manice*, 43 N. Y. 303 (376) ; *Haxtun* v. *Corse*, 2 Barb. Ch. 506 (518) ; *Kilpatrick* v. *Johnson*, 15 N. Y. 322. (3) Postponement of the beginning of accumulation does not invalidate the provision, if it is to begin within the time permitted for the vesting of future estates, and also during the minority of the infant for whose benefit it is directed. Thus a direction to begin accumulation at the expira-

tion of one month after testator's death, and during minority, is valid, if a valid term is marked out within which, if at all, it is to begin, as within one month in case A and B live so long. *Mason* v. *Mason's Executors*, 2 Sandf. Ch. 432 (476–477), aff'd 2 Barb. R. 229.

For whom Accumulations may be Made.

§ 407.—Every accumulation must be made for the sole benefit of an infant. *Pray* v. *Hegeman*, 92 N. Y. 508 (516, 517, 519 ; see s. c. 98 N. Y. 351 ; *Barbour* v. *DeForest*, 95 N. Y. 13 ; *Harris* v. *Clark*, 7 N. Y. 242 ; *Manice* v. *Manice*, 43 N. Y. 303 ; *McCormack* v. *McCormack*, 60 How. Pr. 196 ; *Craig* v. *Craig*, 3 Barb. Ch. 76 (92) ; compare *Titus* v. *Weeks*, 37 Barb. R. 136 ; (but see *Toms* v. *Williams*, 41 Mich. 552 (569) ; *Wilson* v. *Odell*, 58 Mich. 533) ; *Boynton* v. *Hoyt*, 1 Den. 53 ; *Cook* v. *Lowry*, 95 N. Y. 103 (107). See *Bean* v. *Bowen*, 47 How. Pr. 306 ; compare *Bryan* v. *Knickerbacker*, 1 Barb. Ch. 409 (425) ; *Kilpatrick* v. *Johnson*, 15 N. Y. 322 ; *King* v. *Rundle*, 15 Barb. R. 139 (145). See *Gott* v. *Cook*, 7 Pai. Ch. 521 ; *Matter of Hoyt*, 32 N. Y. State Rep. 787 ; *Matter of Sands*, 1 Con. 259 ; *Potter* v. *McAlpine*, 3 Dem. 108 (127). (For an exception where a trust company is the trustee, see the Banking Law, L. 1892, ch. 689, § 160, and Birdseye's note, 2d ed., p. 230.) Thus a direction to accumulate rents and profits during a specified minority, add the accumulations to the principal and hold the consolidated total in trust to receive and apply the rents and profits for the benefit of the same person, with a limitation over to others upon his death, is void. For although the minor is benefited to some extent, the accumulation is not solely for his benefit. See *Pray* v. *Hegeman*, 92 N. Y. 508 (513). (Compare s. c. 98 N. Y. 351) ; *Barbour* v. *DeForest*, 95 N. Y. 13. Accumulation may, in the case of real property, be directed to commence at the end of two lives in being, for the benefit of a person then a minor, and extend through his minority, where the *corpus* is to vest in him in possession at his majority, or go over on an alternative disposition in case of his death during minority. This case is held to be covered by the provisions of § 32 of the Real Property Law. But in order that such an accumulation may be considered valid, the remainder to the infant

must be vested though defeasible. If vested in interest it will support the accumulation. *Manice* v. *Manice*, 43 N. Y. 303. These propositions are inapplicable to accumulations of personal property. Compare Real Prop. L., §§ 32, 51, with 1 R. S. 773, §§ 1, 3. *Post*, § 413, *et seq.*

§ 408.—If a valid term is marked out, within which the provisions for accumulation must be accomplished if at all, there may be a direction for successive accumulations, as, first, wholly for A ; then, beginning from a later period, for A and B equally ; then, as A reaches majority, leaving B and C minors, for B and C equally, etc., *Mason* v. *Mason's Executors*, 2 Sandf. Ch. 432 (475) ; aff'd 2 Barb .R. 229 ; but not for an accumulation until all of several children reach majority. *Forsyth* v. *Rathbone*, 34 Barb. R. 388.

A scheme of accumulation may validly provide that if necessary a part of the rents may be applied to the use of the infant instead of accumulated, and also that the test of this necessity should be the insufficiency of its other means of support. *Roe* v. *Vingut*, 117 N. Y. 204 (218). A devise in trust to lease, and accumulate the rents until they reach a sufficient sum to therewith pay off testator's debts, is invalid, as no trust to accumulate is allowed for such a purpose. *Wells* v. *Wells*, 30 Abb. N. C. 225. In so far as the debts were general, and not charged on the land in question, the trust would also be invalid under the second class of trusts. In the case cited the debts in question were in fact secured by mortgages, and thus were charged on the land. It might not seem altogether clear that the trust in such case would be invalid, under the second class, though it is perhaps the better view that that class of trusts contemplates the application of the rents as received, to the payment, on account, of the debts charged. Compare *post*, §§ 469, 470.

How the Term must be Measured.

§ 409.—As already stated, the term for accumulation is governed by two statutory provisions. By the first and general one, it must be restricted within two lives, and, in the proper case, a further minority. (Real Prop. L., § 32.) By the second and special one, it must also begin during, and end with, the minor-

ity of the beneficiary in question. (For an exception, see the provision of the Banking Law, L. 1892, ch. 689, § 160, and Birdseye's R. S., 2d ed., p. 230, note.) In order that it may be brought within the terms of § 32 of the Real Property Law, allowing suspension for a minority after two lives, the remainder in the *corpus* must be vested (defeasibly) in the infant while the accumulation is proceeding. *Manice* v. *Manice*, 43 N. Y. 303 (374). Within the limits thus thrown around the term by these provisions, the minority of the beneficiary is the strictly essential measure of its duration, *Cook* v. *Lowry*, 95 N. Y. 103 (107); *Matter of Dey Ermand*, 24 Hun, 1; *McCormack* v. *McCormack*, 60 How. Pr. 196; *King* v. *Rundle*, 15 Barb. R. 139 (145); *Williams* v. *Williams*, 8 N. Y. 524; *Simpson* v. *English*, 1 Hun, 559; *Matter of Hoyt*, 32 N. Y. St. Rep. 787. Thus, it is not allowable to direct its continuance for a fixed term not measured by minority, *Rice* v. *Barrett*, 102 N. Y. 161, or for a time not measured at all, *Yates* v. *Yates*, 9 Barb. R. 324, or for several lives, *Hobson* v. *Hale*, 95 N. Y. 588 (616, 617); *Harris* v. *Clark*, 7 N. Y. 242. For a change in the phraseology, and possibly in the meaning, of the general statute relating to the term of suspension, see *ante*, § 386.

When the Term must End.

§ 410.—When the minor reaches majority the trust for accumulation must cease. *Goebel* v. *Wolf*, 113 N. Y. 405 (415); *Bryan* v. *Knickerbacker*, 1 Barb. Ch. 409. (For an exception, where the trustee is a trust company, see the Banking Law, L. 1892, ch. 689, § 160, and Birdseye's R. S., 2d ed., p. 230, note.) If he die during minority, it ceases at his death. *Goebel* v. *Wolf*, 113 N. Y. 405 (415). If the direction is for a longer term than minority, it is void only for the excess. Real Prop. L., § 51, subd. 3; *Radley* v. *Kuhn*, 97 N. Y. 26 (32); *Gilman* v. *Reddington*, 24 N. Y. 9 (19); *Schermerhorn* v. *Cotting*, 131 N. Y. 48 (61); *Robison* v. *Robison*, 5 Lans. 165. Its invalidity in this respect not only does not affect the validity of the accumulation during minority, but does not affect the validity of other parts of a general trust scheme. *Schermerhorn* v. *Cotting*, 131 N. Y. 48 (61, 64); *Greer* v. *Chester*, 62 Hun, 329; aff'd 131 N. Y. 629; *Arthur* v. *Arthur*, 3 App. Div. 375. See also

post, § 744. A trust to receive and accumulate rents, etc., until A becomes 25, for the sole benefit of B and C, infants, is valid if the respective ages of A, B and C are such that A must reach 25 before B or C comes of age. *Radley* v. *Kuhn*, 97 N. Y. 26 (32).

The Accumulated Fund.

§ 411.—The *corpus* out of which the accumulations are to be raised may be given over to others in case of the death of the beneficiary either before or after coming of age. As to the accumulations themselves, it is undisputed that after the infant once reaches majority they belong to him indefeasibly. *Gilman* v. *Healy*, 1 Dem. 404, and cases cited ; *Pray* v. *Hegeman*, 92 N. Y. 508 ; but see s. c. 98 N. Y. 351 ; and *Barbour* v. *DeForest*, 95 N. Y. 13 ; and the trust instrument cannot provide that they shall then be held on a further trust for his use. *Tweddell* v. *N. Y. Life Ins. & Trust Co.*, 82 Hun, 602. But the disposition of the accumulated fund in case of the death of the minor before reaching majority, gave rise to a conflict of decisions in the courts below, and has only recently been passed on by the Court of Appeals.

(1) *Bolton* v. *Jacks*, 6 Robt. 166 (230). (1868.) Here there was such a disposition, and the court thus discuss its validity: "As by the act of God, it has become impossible to comply with the provisions of the statute, by devoting the accumulations to the benefit of the minor, the accumulated fund must, if there are no directions in the will, and no clause in the will which would carry it in a different direction, revert back, and, in such event, the testator would die intestate as to such fund. But there is no reason why a testator should not have the power to anticipate such an event, and treat this accumulated fund as a part of his original estate, and devise it to such persons as he chooses." The court then call attention to the fact that in either view of the question their decision of the case in hand would be unaffected.

(2) *Willets* v. *Titus*, 14 Hun, 554. (1878.) In this case testator gave the "free use" of his estate, real and personal, to his wife and daughter. On the majority of the daughter the property was to be divided between them. If the daughter should

die during minority, then the wife was to have it all. If the wife should die during the daughter's minority, then the daughter was to have it all on reaching majority, and until then it was to be "handed out" at the discretion of the executors. If the wife and daughter should both die during the daughter's minority, then the said real and personal property was to be divided between certain other persons named. In fact, first the wife and then the daughter died during the minority of the latter. It appeared that not all of the rents and income had been paid over to them, and that there was, therefore, a surplus on hand. The disposition of this surplus was in question before the court. It will be noticed that the will did not direct any accumulation, and to this fact the court call attention, but say that "assuming" that a direction to accumulate is to be implied from the direction to the executors to "hand out" in their discretion, the direction is a valid one. And it is held that "if the daughter had reached the age of twenty-one years, then all would have come to her in possession; but as she did not, the whole body of the estate, which included all that had not been handed out to the daughter, passed under the third clause of the will."

(3) *Gilman* v. *Healy*, 1 Dem. 404 (408). (1882.) Here the question was not before the court, but the same principle is stated, and *Bolton* v. *Jacks, supra*, and *Willets* v. *Titus, supra*, are referred to with approval.

(4) *Draper* v. *Palmer*, 27 N. Y. State Rep. 510. (1889.) Here there was a trust of land in two shares, the rents of one share to be applied to the use of J until he reached the age of thirty, when he was to receive the property. If he should die under thirty, it was to go over, free of the trust, to R. If there should be any rents not needed for J's support, they were to be accumulated during his minority and at majority paid over to him. J died during minority. One question before the court was the proper disposition of an amount already accumulated for his benefit. The court say: "In the directions given for the accumulation, the grantor strictly *confined himself to the power provided for that object by the statute*, for the accumulation was directed to be for the benefit of the son out of whose share or interest it arose during his minority. . . . And having been declared in the deeds to be solely for the benefit of this deceased

grandson as far as the accumulation of the rents and profits of his share were made, the rents and profits so accumulated belonged to him. They were unqualifiedly to be for his benefit. And he was in no manner afterward directed to be deprived of that benefit, but it was to be ultimately secured by paying over the accumulations to him on his attainment of the age of twenty-one years. The *object of the statute*, as well as of this language of the deed, *in confining the accumulations to the benefit of the minor*, was to vest the right to the moneys, *as they accumulated* out of the share of the estate appropriated for him by the deeds, in him. . . . It was the *payment* and not the *right*, which was in this manner postponed." And it is held that the fund went to the infant's next of kin. It is true that in the case last cited the creator of the trust did not attempt to provide an alternative disposition of the accumulations in case of the death of the minor under age. What the case exactly decides is that where the creator of the trust to accumulate does not attempt to provide for the devolution over of the accumulations in case of the death of the minor during minority, there the accumulations will, in case of such death, be regarded as indefeasibly vested in the minor. But the strong implication of the opinion is that the testator could not have given the accumulated fund over to another, even if he had tried to, and that the necessary and unavoidable consequence of a trust to accumulate is, to vest the accumulations indefeasibly in the minor, as fast as they accrue, subject to the postponement of mere possession, under the trust. And this view certainly seems to be supported by far the weightier reasons.

(5) *Goebel* v. *Wolf*, 113 N. Y. 405 (415). (1889.) "The provision for accumulation became inoperative as to the share of the deceased minor child upon his death. . . . We think the consequence of such death was to devolve the title to the one-fourth part of the estate in remainder upon the heirs-at-law and next of kin of the deceased child, according to the nature of the property, and that they are likewise entitled to a like proportionate share of any income accumulated to the time of the death. . . ." This case at least settled one point—that where there is no contrary direction in a will, the accumulated fund passes to the infant's heirs or next of kin, at any rate where the

infant was vested with the *corpus* subject to the trust. It would follow that the infant, if of sufficient age, might also have disposed of the accumulated fund by will (unless the implication here is that the accumulations from land must go to those who receive the land, in which case, as an infant cannot make a will disposing of land, he could not dispose of the accumulated rents therefrom.)

(6) *Roe* v. *Vingut*, 117 N. Y. 204 (217). (1889.) Here the will provided for an accumulation, to be paid over to respective infants at majority. By the fourth and fifth subdivisions provision was made for the payment of the "share" of a deceased infant to its issue, or failing that, to the survivors. The court construe "share" to include "accumulations" (compare *Smith* v. *Parsons*, 146 N. Y. 116), and say "such a provision for the disposition of an accumulation for the benefit of an infant, in case of his death, is good."

(7) *Smith* v. *Parsons*, 146 N. Y. 116. (1895.) Here the testator had created a trust of personal property, to apply the income of certain shares, so far as required, to the use of respective infants, and to accumulate any surplus income for them respectively until majority or earlier death, and at majority to pay over the accumulated fund, and continue to hold the corpus in trust for the use of the beneficiaries during life, and upon the death of a beneficiary, *before or after majority*, to transfer her *share* to persons designated. One of the beneficiaries died during minority. A large fund had been accumulated from the income of her share. The question was, whether these accumulations passed to her administratrix, or to her sister as entitled under the gift over in testator's will. "The single question presented by this appeal is whether the accumulations of income upon Martha's share [Martha being the deceased infant] vested as they were paid in, or was the vesting postponed until she attained the age of twenty-one." The court held (*a*) that "it is the policy of the statute permitting the accumulations of personal property for the benefit of a minor [1 R. S. 773, § 3] that they should vest in the infant beneficially when received, and it is only payment over that is postponed until the expiration of the minority;" (*b*) that in the case before the court, testator in using the word "share" (compare *Roe* v. *Vingut*, *supra*) had made a

gift over of the corpus, in case of the infant's death during minority, but had not attempted to include the accumulations therein, and that therefore the accumulations, having vested in the infant, passed to her administratrix (from which it follows that if she had been of sufficient age, she might have disposed of them by will). (*c*) By way of *dictum*, though stated explicitly, all the judges concurring, that testator had power to make such disposition of the accumulated income of an infant dying during minority as he might see fit; "there is no legal objection to bequeathing the same to any person, whether a minor or of full age, and such a provision in a will would not violate the statute which provides that accumulations must be for the benefit of minors." The following sentence, however, seems inconsistent with this: For the court say: "When a minor dies, for whose benefit accumulations of income have been directed, it is competent for the testator to dispose of them in the same manner as any other portion of his estate, *provided they have not vested in the infant as paid in.*" But, as already stated, the court held that the policy of the statute is that they shall vest in the infant as received. It is difficult to determine just what the effect of these *dicta* is. See s. c. *sub nom. Smith* v. *Campbell*, 75 Hun, 155. It is to be noticed that this case related to a trust of personalty. Where there is a testamentary gift of a share of testator's estate to an infant, with a gift over in case of his death during minority, and he does in fact die under age, any unexpended income then on hand belongs to the infant's estate. But such a case does not involve a trust for accumulation, the will containing no direction to that effect. *Beardsley* v. *Hotchkiss*, 96 N. Y. 201 (217); see also *Tweddell* v. *N. Y. Life Ins. & Trust Co.*, 82 Hun, 602. *Post*, § 490.

What not an "Accumulation."

§ 412.—The accumulations dealt with by the statute are such as are called for by the express terms or necessary implication of the trust instrument, and not such as happen to be made by the trustee or beneficiary out of income not required or not used for support, etc., nor such as result from the directions of a decree. Thus, the fact that a beneficiary of a trust, or a legatee, does not use up all the rents, or income, and chooses to allow

them to accumulate in the hands of the executor or trustee, does not create an "accumulation." *Livingston* v. *Tucker*, 107 N. Y. 549. See *Beardsley* v. *Hotchkiss*, 96 N. Y. 201 (217); *Matteson* v. *Armstrong*, 11 Hun, 245 (249); *Robison* v. *Robison*, 5 Lans. 165 (169); *Thomas* v. *Pardee*, 12 Hun, 151 (150); *Matter of Benson*, 96 N. Y. 499. *Post*, § 490. A direction to add to the principal of the trust estate, royalties on ore to be excavated from the lands held in trust, does not fall within the statute. The royalties are essentially the price received for portions of the *corpus*. *Palms* v. *Palms*, 68 Mich. 355. On this point see the will in *Lee* v. *Tower*, 124 N. Y. 370. Nor does it constitute "accumulation" to retain and apply the interest to make good a depletion of the original capital occasioned by an anticipatory payment of a future interest. See *Livingston* v. *Tucker*, 107 N. Y. 549 (552). A trust of real and personal property to receive rents and income and during a child's minority to apply the same or so much thereof as may be necessary for his support, maintenance and education, and after majority to pay over all said rents and income to him for life—with remainder in the *corpus* to his surviving children if any, otherwise to others—is not void because the balance of rents and income, if any, during his minority, *may* be added to the corpus and interest obtained therefrom for the minor. There is no *direction* for an accumulation. *Horton* v. *Cantwell*, 108 N. Y. 255 (265). A testamentary provision creating a real property trust, to receive and apply income, and giving to the trustees sole direction and management of the property, and wide discretionary powers concerning it, and authorizing expenditures of income, within reasonable limits, to perfect or protect the *corpus*, or make improvements which are a protection of the trust business, as a going concern, *semble* does not fall within the prohibition of the statute regarding accumulations; if confined to preservation of the *corpus*, and maintaining or increasing its earning efficiency, it is not objectionable as an accumulation. *Matter of Nesmith*, 140 N. Y. 609. Apart from the validity of such a *provision*, the voluntary act of a trustee in using funds from his own pocket to improve the *corpus*, and increase or maintain its earning power, and charging the same against the *increased earnings* thus effected, is not hostile to the statute, and he is entitled to such reim-

bursement during the trust term. Such a disposition of the matter is within the legitimate exercise of the judicial powers of the surrogate. *Id.*

It might also, under this last point, be said that the statute is only aimed at the direction of accumulation by the terms of the instrument, and not at a proper equitable adjustment of the rights of a trustee who chooses to risk his own property in improvements and additions to the *corpus*, and who seeks reimbursement merely from the *increased income* thereby secured, if any, the beneficiaries receiving in full all the current income of the original *corpus*, as if the new improvements had not been made. In the case last cited, the trust estate consisted of land, on which were storage warehouses. The trustee from his own funds built a new building on the land, at a cost of $12,000, and thereby increased the total rental value of the entire estate by $6000 annually, and he was allowed to retain such increase during the trust term until reimbursed. Here, it might be said, a new element is introduced. For the $6000 annual increase was not due solely to the $12,000 building, but partly to the fact that the trust land was thereby utilized and rendered valuable, and that therefore part of the income applied to reimburse the trustee and thus indirectly to pay for the $12,000 building, was derived not from the loan but from the income of the original *corpus*. To this there are two answers. First, that it was not directed by the instrument, and so not covered by the statute. Second, that the reimbursement was derived solely from income which, from whencesoever derived, *would never have existed* but for the loan. And whether or not it came from the *corpus* or from the loan, it did at any rate arise *solely from the fact* of the loan and its use. *Matter of Nesmith*, 140 N. Y. 609. A trust to accumulate a fixed sum (say $700), for an infant, during his minority, from rents, etc., is valid under Real Prop. L., § 76, but being for the payment of a sum in gross, it is assignable. A trust for accumulation is inalienable only when it covers the rents and profits *generally*. "Where the sole object of the trust is to pay a sum in gross, by collecting and accumulating rents, etc., to a specific amount, the *cestui que trust* may release or assign." *Radley* v. *Kuhn*, 97 N. Y. 26 (31–32). Compare *Cochrane* v. *Schell*, 140 N. Y. 516.

§ 413. **Personal property.**—" An accumulation of the interest of money, the produce of stock or other income or profits arising from personal property, may be directed by any instrument sufficient in law to pass such personal property as follows :

" If the accumulation be directed to commence from the date of the instrument, or from the death of the person executing the same, such accumulation must be directed to be made for the benefit of one or more minors then in being, or in being at such death, and to terminate at the expiration of their minority :

" 2. If the accumulation be directed to commence at any period subsequent to the date of the instrument, or subsequent to the death of the person executing such instrument, it must be directed to commence within the time allowed in the first section of this title, for the suspension of the absolute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and must terminate at the expiration of their minority. 1 R. S. 773, § 3.

" All directions for the accumulation of interest, income or profit of personal property, other than such as are herein allowed, shall be void ; but a direction for an accumulation, in either of the cases specified in the last section, for a longer term than the minority of the persons intended to be benefited thereby, shall be void only as respects the time beyond such minority. *Id.*, 774, § 4.

" When any minor for whose benefit a valid accumulation of the interest or income of personal property shall have been directed, shall be destitute of other sufficient means of support and education, the Supreme Court at special term, and, where such accumulation has been directed by any last will and testament, the Surrogate's Court of any county in which such last will and testament has been admitted to probate, upon the application of such minor or his guardian, may cause a suitable sum to be taken from the moneys accumulated, or directed to be accumulated, and to be applied to the support and education of such minor." *Id.*, § 5, as amended. For a special provision relating to accumulation where the trustee is a trust company, see the Banking Law, L. 1892, ch. 689, § 160 ; Birdseye's R. S., 2d ed., p. 230, note.

As has already been stated, an accumulation of the rents and

profits of land may begin immediately upon the termination of two lives. (See *ante*, § 392.) But in the statute relating to accumulation of the income of personal property, the phrase relating to time is "*within* the time allowed for suspension of the absolute ownership." But the time allowed for suspension is two lives. Therefore, accumulations of the income of personal property must begin *before* the two lives have expired. The distinction between the two classes of property may, therefore, be stated thus: In the case of real estate, the accumulation must begin before or at the time prescribed for vesting, namely, *by or at the end* of the two lives; while in the case of personal property, it must begin *during* the two lives. This distinction is clearly set forth in *Manice* v. *Manice*, 43 N. Y. 303 (381 *et seq.*).

The discussion of this point, in the case just cited, may be summed up as follows: In the case of real property, when the two lives have ended, there is, in certain cases, opportunity for a further suspension during a minority. Here the accumulation may begin *at the end* of the two lives, and extend on through the minority. But in the case of personal property, when the end of the two lives has been reached, there is no further opportunity for suspension, and consequently none for accumulation. It necessarily follows, therefore, that a trust for accumulation of the income of personal property, in order to secure any leeway to effect its purpose, must perforce begin *within* the term of suspension—that is, within two lives in being, and then run until the majority or earlier death of the infant, or the sooner termination of the two lives, is reached.

Apart from the differences to which attention has been called, it is seen that here, as in the case of real property, the period of accumulation is regulated by two distinct provisions. By the first it must begin, continue and end within the limit of two lives in being. (See the change in the phraseology of the statute on this point, *ante*, § 386.) By the second it must also begin, continue and end within the minority of an infant for whose benefit the accumulation takes place. It may begin at the date of the instrument, or at the death of the testator, or subsequently, see *Gott* v. *Cook*, 7 Pai. Ch. 521 (541), but in neither case may it be directed to begin before the birth of the minor. When he reaches majority it must cease. When the two designated lives

end it must cease. See *Gott* v. *Cook*, 7 Pai. Ch. 521 (541). If the minor dies before coming of age it must cease. It must be for the sole benefit of the minor. *Bean* v. *Bowen*, 47 How. Pr. 306. As a general proposition it is settled that the statute concerning accumulation of the income of personal property is substantially the same as that concerning accumulation of the rents and profits of land. *Post*, Chap. XXXI.

(2) *Personal Property.*

§ 414. **Purpose, in general.**—A trust in personal property may be created for any purpose not *per se* illegal. *Gilman* v. *Reddington*, 24 N. Y. 9 (12); *Barry* v. *Lambert*, 98 N. Y. 300; *Hirsh* v. *Auer*, 146 N. Y. 13 (19); *Bucklin* v. *Bucklin*, 1 Abb. Ct. App. Dec. 242 (249); *Hamer* v. *Sidway*, 124 N. Y. 538; *Matter of Denton*, 102 N. Y. 200; *Van Vechten* v. *Van Veghten*, 8 Pai. Ch. 104 (128–129), aff'd 1 Sandf. Ch. 395; *DePeyster* v. *Clendining*, 8 Pai. Ch. 295 (305), aff'd 26 Wend. 21. Trusts of personal property are not, in respect either of the mode or purposes of their creation, within the Statute of Uses and Trusts. *Matter of Carpenter*, 131 N. Y. 86 (88). But in particular, there is a detailed statute relating to trusts in personal property for the purpose of accumulating the income (*ante*, §§ 406, 413). Though any purpose, not illegal, suffices, it has been questioned whether a transfer of property to one, merely "in trust" for another, without specifying what is to be done with it, names any purpose at all. See *Hagerty* v. *Hagerty*, 9 Hun, 175. No special difficulty seems to exist in such cases. If the intent of the testator appears to be, from the entire instrument, that the property is to be held in trust for a lawful period, and that the beneficiary shall enjoy the income, the absence of explicit directions is immaterial. If no such intent appears, then the trust is a mere naked trust, and the beneficiary may claim the property at once from the trustee—*e.g.*, an insurance policy payable to B in trust for C. *Butler* v. *State M. L. A. Co.*, 55 Hun, 296 (302), aff'd 125 N. Y. 769. The cases of trusts relating to deposits in savings banks (*ante*, § 87), seldom indicate any particular purpose. Also *Matter of Cooper*, 6 Misc. 501 (507).

§ 415. **Illustrations.**—Thus valid trusts in personal property

may be created, to receive certain annual *income* from executors and to pay it to the use or benefit of A, *Thompson* v. *Conway*, 23 Hun, 621 ; to collect and pay over the proceeds of promissory notes to a person designated by the creator of the trust, *Matter of Carpenter*, 131 N. Y. 86 (89) ; to hold a mortgage, as mortgagee, to secure a (personal or corporation) bond, or to secure any legal agreement, *James* v. *Cowing*, 82 N. Y. 449 (453–454) ; *Merrill* v. *F. L. & T. Co.*, 24 Hun, 297 ; *Ottman & Co.* v. *Cooper*, 81 Hun, 530 ; *King* v. *Merchants' Exchange Co.*, 5 N. Y. 547, but compare *ante*, §§ 99, 103 ; to pay taxes, charges and liens on certain lands, *Bidwell* v. *Greenshield*, 2 Abb. N. C. 427 ; to hold bonds issued by a town for railroad purposes, *Town of Lyons* v. *Chamberlain*, 89 N. Y. 578 ; to manage, with power to sell, and return proceeds to the creator of the trust, *Hill* v. *Heermans*, 6 Hun, 661 ; to receive and apply income to the creator of the trust, *Foster* v. *Coe*, 4 Lans. 53 (57) ; to make advances to a beneficiary, *Hill* v. *Hill*, 2 Lans. 43 ; to carry on a business, *Ottman & Co.* v. *Cooper*, 81 Hun, 530. If the drawer of a check transfers to the bank securities for the purpose of enabling it to meet the checks, as a fund to secure the payee, and the drawer then fails, the bank holds the securities as *trustee* for the holders of those checks, as against other creditors of the drawer. *Watts* v. *Shipman*, 21 Hun, 598. A fund deposited with bankers for the expressed purpose of paying certain declared dividends on stock, or interest due on bonds, is a trust fund, *Matter of Le Blanc*, 14 Hun, 8 ; aff'd 75 N. Y. 598 ; *Hurd* v. *Farmers' L. & T. Co.*, 63 How. Pr. 314. Compare *Pierson* v. *Drexel*, 11 Abb. N. C. 150, where a deposit was made with bankers as a fund applicable to the payment of certain claims, but with no intention of creating a trust. See also *Butler* v. *Duprat*, 51 Super. Ct. 77. An assignment by one member of a firm, to a third party, of all the property real or personal, owned by him in the partnership, in trust for the use of the grantor, does not purport to, or does not in reality, convey any share of the estate, but merely transfers a chose in action to enforce an accounting and payment of proportion of balance. A trust in such an interest is not prohibited, and its purposes are not restricted by the Statute of Uses and Trusts. *Greenwood* v. *Marvin*, 111 N. Y. 423 (438).

The cases already cited merely illustrate, but do not cover, the wide field of purposes for which personal property trusts may be created. Still further illustrations may be found in the classes specifically enumerated in the statute relating to trusts of real property, covering trusts to sell, to mortgage, to lease, to receive and apply or accumulate income, and in the purposes for which powers in trust may be created (Chap. XX.). The only restriction is that the purpose should not be of an illegal character. *Post*, § 620.

§ 416. **Trust for masses, etc.**—But it is to be noticed that though the purpose is thus unrestricted, there are other essential elements of a trust that must be present. Thus, the law finds no objection to the purpose of providing for masses. But an express trust cannot[1] be created for that unobjectionable purpose for the reason that there is no beneficiary to enforce it. *O'Conner* v. *Gifford*, 117 N. Y. 275 (280); *Holland* v. *Alcock*, 108 N. Y. 312. See *People* v. *Powers*, 147 N. Y. 104. But the same end may be obtained by making a contract *inter vivos* providing for the saying of masses after death. *Gilman* v. *McArdle*, 99 N. Y. 451. Such a transaction does not constitute a trust. *Id.* So such a contract may be made providing for a monument, the enclosing of a burial plot, etc. *Matter of Conklin*, 2 Con. 176. In *Todd* v. *Vaughan*, 90 Hun, 70, it was held that a valid trust might be created *inter vivos*, to pay funeral expenses, and also to provide for funeral expenses and a gravestone for a third party. The result was correct, but it would appear that the transfer could only be sustained as a contract and not a trust. So the same end might in a sense be attained by absolute gift of property, *inter vivos* or by will, the donor or testator relying solely on the option of the donee or legatee to provide for masses in accordance with the mere expression of a desire, *ante*, § 36 (*g*); *post*, § 521. And in *Matter of Backes*, 9 Misc. 504, it was held that a testamentary direction to the executor to expend a portion of the estate held by him as executor and not as trustee, for masses, was valid. Whether this conclusion is sound, depends on whether the duty imposed can be said to fall within the

[1] See the reference to the new statute, at the end of this section.

scope of executorial duties. In one sense, the duties of an executor are merely to settle up the estate by collecting assets and paying debts and legacies; and anything not fairly within this field can be performed by him only by virtue of an express trust, vesting in him the legal title, or a power in trust. (See *ante*, § 156 *et seq.*) But powers in trust, like express trusts, require for their validity an ascertained living individual as the beneficiary. It remains to consider how widely the field of an executor's duties may be validly extended by the will, without requiring a trust or a power. For one thing, the law imposes on the executor as such the duty of burying the decedent, and providing a gravestone. *Patterson* v. *Patterson*, 59 N. Y. 574; Code C. P., § 2749. If, therefore, the will contains a bequest to the executor for those purposes, it thereby merely deals with the subject of executorial duties, and does not create a technical trust at all. *Emans* v. *Hickman*, 12 Hun, 425; *Matter of Frazer*, 92 N. Y. 239 (249). So it is settled that testator may enlarge the purely executorial duties by extending them long into the future in connection with the payment of annuities (not under an express trust), *Clark* v. *Clark*, 8 Pai. Ch. 152; and also, that he may charge his executor with the duty of expending capital of the estate in preserving and keeping in order, or repairing, a burial plot (where the executor is not vested with title to the fund, as legatee in trust), *Pfaler* v. *Raberg*, 3 Dem. 360; *Matter of Frazer*, 92 N. Y. 239. In *Matter of Fisher*, 2 Con. 75 such a provision was held void, as involving an illegal suspension, though this view of the given scheme might seem doubtful. In regard to a direction to employ a part of the estate for procuring masses, while it is clear that a trust cannot be created, it is not clear that a mere direction to use a portion of the estate to pay for prayers might not be as readily sustained as a direction to pay for a cemetery lot, or for the services of a workman in repairing it. *Matter of Hagenmeyer*, 12 Abb. N. C. 432. See *Matter of Black*, 1 Con. 477; *Wood* v. *Vandenburgh*, 6 Pai. Ch. 277 (284). In both cases there is no trust and no beneficiary, but a purpose to be attained in making decent dispositions relating to testator's death, a purpose to which, *per se*, the law has no objection. However this may be, the matter is now perhaps covered by the new law relating to transfers of property,

inter vivos or by will, for religious uses, where the beneficiaries are indefinite or uncertain, but the scheme is in other respects valid. See *post*, § 513 ; Fowler, Char. Uses, pp. 91, 111. The cases under discussion, however, raise a question whether the new statutes apply not only where the beneficiaries are indefinite and uncertain, but also where there are *no* beneficiaries at all and it is not even contemplated that any are to be selected or ascertained at any time.

CHAPTER VIII.

RENTS, ISSUES AND PROFITS.

(1) *Corpus and Income Distinguished.*

§ 417. **Introductory.**—In considering the distinction between corpus, and rents, issues and profits, as between life tenant and remainderman, the authorities are in many respects equally applicable whether the life interest is held beneficially or in trust. The questions presented are frequently of great difficulty, but certain principles are well established. In the first place, the cardinal rule is that the intention indicated in the trust instrument shall prevail. If it appears that the creator of the trust intended accretions of the class in question in a given case to go to the life tenant, or to go to the remainderman, this is conclusive: *Monson* v. *N. Y. S. & T. Co.*, 140 N. Y. 498 (515), the will being given in full in 24 N. Y. Supp. 455 (with which compare *Duclos* v. *Benner*, 136 N. Y. 560) ; *Matter of Gerry*, 103 N. Y. 445 (449). Many of the cases to be cited on the present subject turn to some extent on the phraseology of the instruments in question, and to that extent fall short as authorities on the rules to be followed when the instrument is silent.[1] (For a reference to many articles in legal publications on the present topic, see footnote in 2 Con. p. 165 ; also *Riggs* v. *Cragg*, 26 Hun, 89, which was reversed in 89 N. Y. 479 (487), on the ground of lack of jurisdiction in the courts below).

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[1] In *Linsly* v. *Bogert*, 87 Hun, 137, the will gave to the life beneficiary of a trust fund the increase to be realized on the principal, and it was held that (*a*) such increase must mean net increase in the long run, and so could not be ascertained till the life beneficiary's death ; and therefore (*b*) it was not to be supposed that testator meant to give any accretions of corpus to the beneficiary to take effect only when he could no longer enjoy them, rather than to those to whom the fund was given in remainder.

§ 418. **Real property.**—If property held in trust to receive and apply the rents and profits to the use of a beneficiary for a term, with remainder to others, is in the form of real estate, and there is an increase in the value of the land from natural causes, such increase is an accretion to the corpus, and inures to the benefit of the remaindermen. *Matter of Gerry*, 103 N. Y. 445 (450); 2 Perry on Trusts (4th ed.), § 546; *Van Vleck* v. *Lounsbery*, 34 Hun, 569; *Scovel* v. *Roosevelt*, 5 Redf. 121. In apparent hostility to these authorities is a *dictum* in *Clarkson* v. *Clarkson*, 18 Barb. R. 646 (652), where the will authorized the trustees to invest in stock, or mortgages, or real estate, and to pay to the beneficiaries the "interest, dividends or proceeds;" the court said, that if they had invested in real estate, the beneficiaries would be entitled "to the proceeds or profits arising from the investment. This latter might be determined by the sale of the land for an advance, and a reinvestment of the principal as provided by the will." If a mortgage held in trust is foreclosed, and the land is bought in by the trustees, and later sold at an advance, the proceeds, over and above interest on the debt, go to capital. *Schoonhoven* v. *Van Wyck*, 31 Barb. R. 457. Compare *Trust Co.* v. *Hall*, 5 Dem. 73. If trust property is destroyed by fire, the insurance money belongs to the corpus of the trust. *Eagle* v. *Emmet*, 4 Bradf. 117.

§ 419. **Bonds and mortgages.**—If trust funds are invested in government bonds, or bonds secured by mortgage, bearing a fixed rate of interest, which can neither be increased by the prosperity nor diminished by the misfortunes of the debtors, and are eventually to be satisfied by the repayment of the principal sum of the obligation, here any gain realized upon their sale, over and above the amount paid, is capital and not income. The rise in value of such securities is generally due to the fact that subsequent to the original purchase the general rate of interest obtainable on other equally safe securities has declined, while their rate remains unchanged.[1] This increase in value is in no sense a profit on the investment, but is an accretion to the fund, arising

[1] The excess in value, above par, of United States bonds is, like the face value, not taxable. *People* v. *Comm'rs of Taxes*, 90 N. Y. 63. Compare § 432.

from natural causes, and depends on the length of time that may expire before the bonds are paid off. After a certain point, it begins to decline, and at the period of maturity entirely disappears. The benefit of the comparatively high rate of interest is enjoyed annually by the beneficiaries, and if they live till the maturity of the bonds, they have then received in annual interest the entire difference, if any has existed at any time prior thereto, between the face and market value of the securities. *Matter of Gerry*, 103 N. Y. 445. To the same effect are the following authorities: *Matter of Pollock*, 3 Redf. 100; *Townsend* v. *U. S. Trust Co.*, 3 Redf. 220; *Matter of Clark*, 62 Hun, 275 (282); *Matter of Lawrence*, 2 Con. 53 (55); *Cross* v. *L. I. L. & T. Co.*, 75 Hun, 533; *Bergen* v. *Valentine*, 63 How. Pr. 221; *Matter of Proctor*, 85 Hun, 572; *Whitney* v. *Phœnix*, 4 Redf. 180. In *Scovel* v. *Roosevelt*, 5 Redf. 121, the trustee held certain United States 6 per cent. 5–20 bonds, outstanding and uncalled. The government offered, in exchange for the same, (*a*) an equal amount in new 4 per cents; (*b*) accrued interest on the old 6 per cents; (*c*) three months' extra interest on the old 6 per cents. This offer was accepted. It was held that the accrued interest on the 6 per cents, and the regular interest on the 4 per cents, belonged to the life tenant; but that he was only entitled to 2 of the 6 per cent extra interest, thus bringing his total interest up to 6 per cent during the three months in question. Compare *Farwell* v. *Tweddle*, 10 Abb. N. C. 94, where 5–20s were called by the government, under its option reserved in the bonds; also *Whittemore* v. *Beekman*, 2 Dem. 275, where, government bonds having been called, interest to cease after three months, the Treasury Department, before that time had elapsed, ordered them prepaid with interest to the end of said three months. The "interest" for the period subsequent to actual payment was held to represent principal. It would seem, however, that if the unexpected prepayment was accompanied by failure, after due effort, to find a satisfactory reinvestment at once, appropriate allowance should, up to the end of the three months, be allowed to the beneficiary from the prepaid interest. In *Duclos* v. *Benner*, 136 N. Y. 560, the facts were that a will created a trust to set apart and invest a fund of $30,000, or one third of the estate, as the beneficiary

might elect, and pay over the income to a person named, for life, with remainder over. The trustees invested $40,000 in government bonds, and later sold them at a profit. The beneficiary was one of the trustees, and had, in fact, actual management and control of the estate. None of the bonds were in fact ever set off to represent her $30,000, and the court, holding that she was not in a position to make any claim to the surplus realized on sale, did not pass on the question of what her rights might have been if the bonds had been set apart for her. Compare *Matter of Hodgman*, 140 N. Y. 421. If there is a premium on securities when purchased by the trustees, representing the value added by a high rate of interest, part of the interest thereafter received obviously represents principal, and accordingly should be set apart as a sinking fund, so that when the bonds fall due, and are paid off at par, the sinking fund will equal the premium originally paid. *Reynal* v. *Thebaud*, 3 Misc. 187 (190). On this point see also 2 Perry on Trusts, latter part of § 547, and cases there discussed. In *New England Trust Co.* v. *Eaton*, 140 Mass. 532, it is held that a trustee is authorized to pursue this course, and in *Shaw* v. *Cordis*, 143 Mass. 443, that the principle stated does not apply where the original securities in which the fund is invested at the creation of a trust are then at a premium. In such a case nothing should be reserved for a sinking fund. See *post*, § 485.

§ 420. **Stock.**—In *Riggs* v. *Cragg*, 89 N. Y. 479 (487) the court state that the right to "stock dividends" as between tenant for life and remainderman had not been considered by the court of last resort in New York. "The decisions upon the subject in other States and in England are conflicting, and it will be the duty of this court, when occasion arises, to seek to settle the question upon principle, and establish a practical rule for the guidance of trustees and others, which shall be just and equitable as between the beneficiaries of the two estates." In 1886, in *Matter of Gerry*, 103 N. Y. 445 (449), the court speak of "the questions or embarrassments attending the division of gain or profits, arising upon investments in trade, or the stock of corporate business enterprises, and which are usually represented by dividends, either regular or extra, payable in cash, stock, or

scrip, or remaining undivided in the hands of the corporation." The very next year, however, the general subject was at last brought before the court, and the following points were decided :

§ 421.—(*a*) If *before* testator's death, a dividend is declared upon stock left by his will in trust, but he dies before the date fixed for its payment, it is not, at his death, income, but a debt owing to the estate, and does not go to the life beneficiary. This is to be distinguished from *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231, where "the interest *or dividends*" which were given to the life tenant might include dividends of which testator became the legal owner during his life, by virtue of their being declared, though they were payable afterward. *Matter of Kernochan*, 104 N. Y. 618 (623). In *Brundage* v. *Brundage*, 60 N. Y. 544, testator bequeathed twenty shares of stock, and before his death the company used part of its earnings for improvements, etc., and issued to the stockholders, as evidence thereof, and to secure future reimbursement, interest certificates representing these earnings. They carried dividends, and were assignable, and payable at the option of the company out of future earnings, or convertible at the like option, into stock. Testator accepted them, and received dividends thereon. It was held that before his death they became part of his estate, as property distinct from the original shares, and that at his death they did not pass to the legatee of the twenty shares of stock.

§ 422.—(*b*) If *before* testator's death the company has accumulated from income a sinking fund, and after his death his trustees sell the stock at a fixed price, and the purchasers also pay a further sum representing their *pro rata* interest in the sinking fund, this latter sum is properly added to the price of the stock, as principal, and does not belong to the life beneficiaries. Although it represents income, that income still belongs to the corporation, and is not declared as dividends, and still remains pledged for the payment of bonds to secure which the fund was created, and its existence merely enhances the value of the shares. *Matter of Kernochan*, 104 N. Y. 618 (625).

§ 423.—(*c*) If *after* testator's death, and during the life ten-

ancy, a dividend, representing earnings, is declared, it all belongs to the life beneficiaries, and is not to be apportioned by ascertaining what part represented earnings prior to testator's death, and what part subsequent earnings, and allotting these parts respectively to the remainderman and the life tenant. The general rule that dividends belong to him who holds the stock when the dividend is declared and allotted, irrespective of when the earnings accrued or when the dividend is payable (*Clapp* v. *Astor*, 2 Edw. Ch. 379 ; *Hyatt* v. *Allen*, 56 N. Y. 553 ; *Hopper* v. *Sage*, 112 N. Y. 530), is to be applied in determining the relative rights of a tenant for life and a remainderman. (But interest accruing *de die in diem* is apportionable, *e.g.*, in the case of a mortgage. *Clapp* v. *Astor*, 2 Edw. Ch. 379, 383, and *post*, end of § 424.) " The rule is a reasonable and proper one, which limits the right of a stockholder to profits, by the action of the managers of a corporation or company. It is their sole and exclusive duty to divide profits and declare dividends whenever, in their judgment, the condition of the affairs of the corporation renders it expedient, and it would lead to great embarrassment and confusion if a court should undertake to interfere with their discretion so long as they do not go beyond the scope of their powers and authority" (approving *Barton's Trust*, L. R. 5 Eq. 238, 245, and *Re Hopkin's Trust*, L. R. 18 Eq. 696, where an extraordinary dividend out of earnings covering a period of five years, extending back of the testator's death, was held to belong to the life tenant ; and *Sproule* v. *Bouche*, L. R. 29 Ch. Div. 635, 653). *Matter of Kernochan*, 104 N. Y. 618 (626). In this case the dividend was paid in cash ; it has been held by the courts below that the same rule applies, whether it is paid in cash, scrip, or stock, if derived from earnings. *Clarkson* v. *Clarkson*, 18 Barb. R. 646 ; *Simpson* v. *Moore*, 30 Barb. R. 637 ; *Goldsmith* v. *Swift*, 25 Hun, 201 ; *Matter of Warren*, 2 Con. 411 ; *Matter of Woodruff*, Tucker, 58. But if there is a mere *pro rata* distribution of treasury stock, to the stockholders, not representing profits, it belongs to the corpus and is not income. Its issue decreases, *pro tanto*, the value of the original shares, giving to the stockholders a larger number of shares, but no larger fund, and the total issue still represents capital only. *Knight* v. *Lidford*, 3 Dem. 88. And so if a corporation sells a

part of its plant, and distributes the proceeds among the stockholders, they belong not to income but to capital. *Matter of Skillman*, 2 Con. 161. But in *Matter of James*, 146 N. Y. 78 (96–103), it appeared that part of testator's property consisted in stock of three corporations; before his death two of them built railroads, sold them, and received land grants in payment, which in turn they sold, and after his death, and according to their custom, they divided the proceeds of sale as dividends; the other constructed and sold a railroad, and received in payment a certificate of indebtedness secured by a mortgage, upon which payments were received, and, after testator's death, were divided as dividends. The only business of these corporations was to build and sell railroads, take land or other property in payment, and then convert these payments into cash for division. It was held that all these dividends represented income and not capital. Under the peculiar facts, these dividends were ordinary and not extraordinary. The particular terms of the will are to some extent relied on, and the court express doubt whether in the absence of apparent intention of the testator to give the life tenant all that came in under the name of income, these dividends could be regarded as other than capital.

§ 424.—(*d*) If *after* testator's death and *after* the termination of the life estate, a dividend is declared, it belongs to the remainderman, although made from profits wholly or partly accrued during the life tenancy. *Matter of Kernochan*, 104 N. Y. 618 (629); *Hyatt* v. *Allen*, 56 N. Y. 553 (558). But otherwise as to income accruing *de die in diem*, *e.g.*, interest on bonds, notes, etc., *U. S. Trust Co.* v. *Tobias*, 21 Abb. N. C. 392 (400); *Betts* v. *Betts*, 4 Abb. N. C. 317 (415); *Clapp* v. *Astor*, 2 Edw. Ch. 379 (383).

§ 425.—(*e*) Privileges or options given by a corporation to its stockholders, to subscribe for stock and bonds, which option has a value of its own, is held by the trustees as capital and not as income. If accepted, the purchase would operate to increase the capital or change its manner of investment; if not accepted, the life tenant could neither complain of the choice of the trustees, nor in any way control their discretion. *Matter of Kernochan*,

104 N. Y. 618 (630). The following points have been decided in the lower courts :

§ 426.—(*f*) If a corporation is consolidated with another, and for the purpose of equalizing the interests of stockholders of the stock in question, there is during the life tenancy an extra issue to them of stock or of bonds of the consolidated company, this surplus issue merely follows the interest which it is issued to equalize. Thus, in so far as the original stock constituted corpus, the new surplus goes to corpus, *Clarkson* v. *Clarkson*, 18 Barb. R. 646 (657) ; *Goldsmith* v. *Swift*, 25 Hun, 201 ; in so far as stock thus equalized (being a stock dividend during the life tenancy) represented earnings, and constituted income, the new surplus goes to income. *Id.*

§ 427.—(*g*) In allotting stock dividends, etc., to life tenants, only such portion should be distributed as represents earnings. In other words, the fund itself is not to be depleted by such distribution. For example, if stock has been bought at a premium, and an extraordinary dividend is declared, it must first be ascertained whether the selling value of the stock remains as high as that at which it was bought, and if it has fallen, the difference must be subtracted from the extraordinary dividend and retained as corpus, before distributing the balance to the life tenants as profits. Such, at least, is the ruling in *Clarkson* v. *Clarkson*, 18 Barb. R. 646 (657–658) ; logic would seem to lead to the application of the same rule where the original purchase was at par, and there had been a decline. *Simpson* v. *Moore*, 30 Barb. R. 637, as to which last point, however, see *Hyatt* v. *Allen*, 56 N. Y. 553.

§ 428. **Unearned premiums.**—As to "unearned premiums" on a life insurance policy bequeathed, see *Platt* v. *Moore*, 1 Dem. 191 (195).

§ 429. **Contracts.**—Where testator directed his executors to complete the performance of certain contracts made by him in his lifetime, and to that end to make advances ; and also gave the "net annual income" of his estate to his wife, it was held

that profits realized under the contract were not "net annual profits." *Matter of Pollock*, 3 Redf. 100. See *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231 (239).

§ 430. **Payments on account.**—If part of the trust estate consists of a debt owing from a third party, payments by him on account, though not exceeding the accrued interest, must, as between the trust estate and the remainder, be considered as capital, not income. Should the entire claim be paid, with interest, the interest would constitute income. So held, in *Matter of Tietjen*, 5 Dem. 350.

(2) *Deductions from Gross Income.*

§ 431. **Intent controls.**—The statutory terms for income, in connection with trusts of real property, are "rents and profits." Another common phrase is "rents, issues and profits." In trusts of personalty, the usual term is income, or profits. Other designations are often employed in trust instruments, sometimes with the same, and sometimes with a different meaning. Unless thus varied, the terms rents, issues, profits, income, in a trust instrument, mean *net* rents, issues, profits, and income. *Matter of Albertson*, 113 N. Y. 434; *Matter of Deckelmann*, 84 Hun, 476. The creator of a trust might so express himself as to authorize the payment to the beneficiary of funds constituting corpus as well as income, *Matter of Dewey*, 82 Hun, 426, or might direct the amount payable to the beneficiary to be the income reduced by the payment therefrom of charges which otherwise would be paid from capital, *Matter of Young*, 17 Misc. 680, or may, as between the trust fund and other distinct property, specially relieve one and charge the other. So his intention may be either to provide for the application of rents or income, which in such a case means net income, or to provide for an annuity of a specified amount, in which case there are no deductions. *Matter of Dewey*, 82 Hun, 426; *Whitson* v. *Whitson*, 53 N. Y. 479; *Delaney* v. *Van Aulen*, 84 N. Y. 16; *Brimblecom* v. *Haven*, 12 Met. 511; *Swett* v. *City of Boston*, 18 Pick. 123; *Pierrepont* v. *Edwards*, 25 N. Y. 128. So he may provide that the gross income shall be paid to the beneficiary, *Mackay* v. *Dennington*, 82 Hun, 509, aff'd 145 N. Y. 606. Indications of

such special intentions must always be taken into account in estimating the bearing of a given decision. *Clarke* v. *Clarke*, 145 N. Y. 476 (480); *Matter of Jones*, 103 N. Y. 621, aff'g 37 Hun, 430; *Blake* v. *Blake*, 30 Hun, 469 (471); *Bliss* v. *Olmstead*, 3 Dem. 273; *Reynolds.* v. *Reynolds*, 3 Dem. 82; *Matter of Bull*, 5 Dem. 461; *Matter of Thompson*, 5 Dem. 117; *Matter of Williamson*, 1 Con. 139; *Matter of Morris*, 63 Hun, 619, aff'd 133 N. Y. 693; *Wilder* v. *Ranney*, 95 N. Y. 7 (11); *Matter of Braunsdorf*, 2 App. Div. 73. But in cases where the terms of the trust do not vary the general rules, the following charges are to be subtracted from gross income, before paying over the balance to the beneficiary.

(*a*) *What Deducted from Income.*

§ 432. (1) **Ordinary taxes.**—*Deraismes* v. *Deraismes*, 72 N. Y. 154; *Zapp* v. *Miller*, 109 N. Y. 51 (58); *Thomas* v. *Evans*, 105 N. Y. 601 (612); *Whitson* v. *Whitson*, 53 N. Y. 479; *Cromwell* v. *Kirk*, 1 Dem. 599 (603); *Matter of Miller*, Tucker, 346 (348); *Cairns* v. *Chabert*, 3 Edw. Ch. 312; *Booth* v. *Ammerman*, 4 Bradf. 129; *Stubbs* v. *Stubbs*, 4 Redf. 170; *Lawrence* v. *Holden*, 3 Bradf. 142; *Pinckney* v. *Pinckney*, 1 Bradf. 269; *Matter of Deckelmann*, 84 Hun, 476 (477); *Bidwell* v. *Greenshield*, 2 Abb. N. C. 427; *Parkinson* v. *Parkinson*, 2 Bradf. 77; *De Witt* v. *Cooper*, 18 Hun, 67; *Wells* v. *Knight*, 5 Hun, 50; *Wilcox* v. *Quinby*, 73 Hun, 524; *Matter of Young*, 17 Misc. 680. But if a tax assessment is so far completed, before testator's death, as to constitute a debt of the estate, it is the executors who must pay the tax from the assets. *Matter of Babcock*, 115 N. Y. 450; *Griswold* v. *Griswold*, 4 Bradf. 216; *Matter of Steward*, 90 Hun, 94 (99) and cases there cited; *Matter of Young*, 17 Misc. 680. Expenses incurred solely to increase net income, *e.g.*, interest on money borrowed to invest in government bonds, in order to avoid the tax otherwise payable from income, are chargeable against income. *Wheelwright* v. *Rhoades*, 28 Hun, 57 (59). If the beneficiary pays the tax, the trustee has no right to the receipt. *Matter of Brewer*, 43 Hun, 597. (As to the power of a State to subject United States bonds to a transfer tax, see

Matter of Whiting, 150 N. Y. 27, 31 ; and compare *ante*, § 419, note.) [1]

§ 433. (2) **Current expenses.**— *Woodward* v. *James*, 115 N. Y. 346 (360). *Trustee's commissions*, on rents and income. *Matter of Mason*, 98 N. Y. 527 (535) ; *Whitson* v. *Whitson*, 53 N. Y. 479 ; *Booth* v. *Ammerman*, 4 Bradf. 129 ; *Westerfield* v. *Westerfield*, 1 Bradf. 198 ; *Cammann* v. *Cammann*, 2 Dem. 211.

§ 434. (3) **Ordinary repairs.**—*Hancox* v. *Meeker*, 95 N. Y. 528 (537) ; *Cromwell* v. *Kirk*, 1 Dem. 599 (603) ; *Cairns* v. *Chabert*, 3 Edw. Ch. 312 ; *Matter of Deckelmann*, 84 Hun. 476 (477) ; *De Witt* v. *Cooper*, 18 Hun, 67 ; *Wilcox* v. *Quinby*, 73 Hun, 524.[2] And it is not only true that ordinary repairs must, if made, be charged to income, but it is further the duty of the trustee to make them, so far as to prevent decay ; for otherwise the beneficiary would in effect be consuming the corpus at the expense of the remainderman. 2 Perry on Trusts, § 540.

§ 435. (4) **Interest on incumbrances.**[3]—*Gelston* v. *Shields*, 16 Hun, 143 (149), aff'd 78 N. Y. 275 (281) ; *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231 (238) ; *Matter of Deckelmann*, 84 Hun, 476 (477) ; *Wilcox* v. *Quinby*, 73 Hun, 524 ; *Sidenberg* v. *Ely*, 90 N. Y. 257 ; *House* v. *House*, 10 Pai. Ch. 158 ; *Wade* v. *Malloy*, 16 Hun, 226. Unless a contrary intent is expressed. *Moseley* v. *Marshall*, 22 N. Y. 200.

§ 436. (5) **Miscellaneous.**—Expenses of conducting a business, as wages, " trade raising," signs, losses on credits, deterio-

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[1] As to the remedy, if a tax is collected from one person, which another ought to pay, see L. 1896, ch. 908, § 78.

[2] So with the cost of special improvements made at the request and for the convenience of the life tenant. *Betts* v. *Betts*, 4 Abb. N. C. 317 (438).

[3] " Whenever real property held by any person for life is encumbered by mortgage or other lien, the interest on which should be paid by the life tenant, and such life tenant neglects or refuses to pay such interest, the remainderman may pay such interest and recover the amount thereof, together with interest thereon from the time of such payment, of the life tenant." Real Prop. L., § 233.

ration or loss of plant, etc., *Matter of Jones*, 103 N. Y. 621; depreciation in furniture retained unsold because the house could be let furnished for a larger sum than could have been derived from the house unfurnished and from the proceeds of the furniture if sold; provided, however, that that difference [equals or] exceeds the depreciation; otherwise *quære*, *Matter of Housman*, 4 Dem. 404 (409 *et seq.*); liability of testator on certain covenants in leases of property over which his executors have a power in trust to manage. *Downing* v. *Marshall*, 1 Abb. Ct. App. Dec. 525 (540). To sustain a construction whereby capital is impaired in the payment of ordinary taxes, current expenses and interest, the direction should be unmistakable and unequivocal. *Woodward* v. *James*, 115 N. Y. 346 (360); *Matter of Albertson*, 113 N. Y. 434. For some exceptional cases where the general rule of liability is varied, see *Thomas* v. *Evans*, 105 N. Y. 601; *Matter of Young*, 17 Misc. 680.

(b) What not Deducted from Income.

§ 437. **Introductory.**—There are other expenses, however, which, if made under due authority, are not to be charged to, and subtracted from, the rents and income alone, but are either to be charged against the remainderman only, or apportioned between the life tenant and the remainderman. In discussing this subject, the starting point must be the general, and rather strict principle that the trustee, or any life tenant, is not authorized to run up charges for repairs or improvements against the remainderman, or to eat into the capital. 2 Perry on Trusts (4th ed.), § 552; *Matter of Deckelmann*, 84 Hun, 476 (477); *Green* v. *Winter*, 1 Johns. Ch. 26; *Bellinger* v. *Shafer*, 2 Sandf. Ch. 293; *Thomas* v. *Evans*, 105 N. Y. 601 (611) and cases cited; *Matter of Lamb*, 10 Misc. 638 (640). It seems, however, that this rule has become somewhat relaxed, and that the tendency of the later cases is to limit its application. *Stevens* v. *Melcher*, 80 Hun, 514 (532); *Matter of Deckelmann*, 84 Hun, 476 (477).

But it is obvious that the remainderman's interest is his own property, and that the corpus cannot be so employed by others, even though by judicial or legislative sanction, that that interest will be, or may be, depleted or be charged with improvements

thus forced upon him, unless authority to that end can be derived from some competent source. The only sources of authority would seem to be found either (*a*) in the express or implied provisions of the instrument creating the trust, for the creator thereof may direct the disposition as he sees fit; or (*b*) in some agreement between the interested parties which expressly, or by implication, determines the respective liabilities; or (*c*) in the fact that the payment is one duly imposed by law, in the exercise of the general functions of government, upon the appropriate interests, whatever they may be, and where accordingly the courts may determine in a given case that it does not represent mere current charges like an annual tax, but that the interest of the remainderman is solely, or in part, affected; for while neither the courts nor the legislature can arbitrarily take away the property of the remainderman for private purposes, without his approval, for the benefit of the trust estate; nor even for the supposed advantage of the remainderman himself, see *Losey* v. *Stanley*, 147 N. Y. 560, unless the latter is an infant or otherwise incompetent, *id.*, yet the Legislature or the local authorities may duly impose burdens upon the remainderman's interest; or (*d*) in the fact that the charge was already fixed on the corpus, when it came into the trustee's hands, as in the case of a mortgage, or tax attaching prior to testator's death, and where accordingly the trust corpus is not in reality depleted, the estate having consisted merely in the equity or surplus over and above that charge, *Matter of Deckelmann*, 84 Hun, 476 (477); *Matter of Hun*, 144 N. Y. 472; *Smith* v. *Cornell*, 113 N. Y. 320; *Sidenberg* v. *Ely*, 90 N. Y. 257; *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231 (238); compare Code C. P., § 2719; or (*e*) in cases where, on accounting, all parties being before the court, it appears that the net result of the trustee's use of the corpus for outlays, even though unauthorized, has in fact resulted in no loss, or shows a gain, and where, accordingly, in adjusting the accounts the court may set off the depletion of corpus against its accretion, according to general principles of equity; or (*f*) where one entitled to the corpus seeks relief in equity against one who has in good faith expended his own money upon the property under such circumstances as to render it equitable that he should be credited with resulting improvements (*post*, § 442).

The following cases appear to fall within one or another of these classes.

§ 438.—(1) Compulsory outlays, such as municipal assessments for permanent improvements, are generally apportioned. *Thomas* v. *Evans*, 105 N. Y. 601 (612); *Matter of Young*, 17 Misc. 680; as, for flagging sidewalks, *Peck* v. *Sherwood*, 56 N. Y. 615; *Cromwell* v. *Kirk*, 1 Dem. 599 (603); or street widening, *Matter of Miller*, Tucker, 346; or sewers, *Stilwell* v. *Doughty*, 2 Bradf. 311; repairs or reconstruction ordered by the building department, *Stevens* v. *Melcher*, 80 Hun, 514 (523–524). Even though assessments are by the trust instrument charged on income, extraordinary assessments may in some cases still be charged to corpus, and paid from proceeds of a sale or mortgage allowed for the purpose. *Matter of Morris*, 63 Hun, 619, aff'd 133 N. Y. 693; but see the remarks on this case in *Losey* v. *Stanley*, 147 N. Y. 560; and see *Matter of Young*, 17 Misc. 680.

§ 439.—(2) Cases where expenditure is required to make the property, received by the trustee in a deteriorated condition, available, and thus preserve it from destruction and decay. There is a radical difference between such cases, and the erection of new buildings, or the making of substantial alterations or improvements, or ordinary repairs required to offset deterioration during the tenancy; for the life tenant has not permitted the property to become out of repair, but the trustee has received it in an untenantable condition. *Matter of Deckelmann*, 84 Hun, 476.

§ 440.—(3) Cases where the trust instrument authorizes investment and reinvestment in real estate. In such cases the scope of the exception is still wider, and may cover not only permanent repairs, but even the erection of new buildings. The theory is, that such outlays constitute in essence an investment in real estate. *Stevens* v. *Melcher*, 80 Hun, 514 (525–535); 2 Perry on Trusts (4th ed.), § 552.

§ 441.—(4) Cases where the expense in question is essential to preserve the estate from destruction, and thus, while authorized

for the protection of the life tenant, also benefits the remainderman by preserving it for him too. This exception is very indefinite in its boundaries, and of doubtful standing. In *Peck* v. *Sherwood*, 56 N. Y. 615, *Cromwell* v. *Kirk*, 1 Dem. 599 (603–604), and *Matter of Wyatt*, 9 Misc. 285, it was held that the expense of insurance, and lightning rods, should be apportioned. But in the Peck case, the remainderman (who was an executor and trustee) joined with the (beneficial) life tenant in incurring the expenses in question, and it was merely held that it was proper for the trustee to thus charge his remainder with a share of the expense. And in the Cromwell case, the guardian of the remaindermen united with the life tenant in the same manner. In the latter case, *Peck* v. *Sherwood*, *supra*, was relied on as authority for apportioning also the expense of fences, marble mantles, trees and vines. In *Matter of Housman*, 4 Dem. 404, the case of *Peck* v. *Sherwood*, *supra*, seems to have been misunderstood, as it is there said to have squarely held that a life tenant, expending money for insurance, is entitled to reimbursement from the remainderman. Whatever may be the true rule on that point, the *Peck* case is hardly a satisfactory authority. But the surrogate, in the *Housman* case, further suggests that a trustee to whom land is devised to sell, and hold the proceeds in trust for a life beneficiary, and at the termination of the life estate to pay the same over to another, is trustee for both the life beneficiary and the remainderman. It is true that he is trustee for the remainderman, in a sense, but the trust is, to turn over the property unimpaired at the end of the trust term. It is not a trust to force improvements upon the remainderman at the latter's expense. The allowance as against capital of such expenses as the cost of marble mantles, seems not justified by any such doctrine.

§ 442.—(5) Cases where, although the expense is not necessary in order to preserve the estate from destruction, it is necessary in order to make the estate produce any revenue, or a substantial revenue, and will also enhance the permanent value of the property. This exception also, while illustrated by many cases, rests on a foundation somewhat shadowy in nature. (Compare *Thomas* v. *Evans*, 105 N. Y. 601, 611). Thus, in the frequently cited

case of *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231 (240), the testator had left five lots and houses on Cedar Street, and other property, in trust with remainder over. The city, in widening the street, took off ten feet from the front, rendering the property more valuable if warehouses should be erected. The court allowed the trustees to use trust funds to erect such buildings, apportioning the expense between the life tenant and remainderman. The opinion draws a distinction in this respect between these lots, which, at testator's death had houses on them, and the condition of which was radically changed by the action of the city, and other lots, vacant at testator's death, and still others on which old and useless buildings stood before testator's death, which were thereafter destroyed by fire ; on these the court refused to allow the erection of buildings from the trust funds. In *Betts* v. *Betts*, 4 Abb. N. C. 317 (438, 443), the expense of plate-glass windows in a store, and of a tin roof, were apportioned, but it does not appear whether the necessity for these repairs existed at testator's death ; and in any event, it appears (p. 439) that "counsel assent to this." In *Matter of Laytin*, 2 Con. 106, the plumbing in the house in question had become so defective and out of repair that the water ran down and injured the inside walls of the house, and the house had become almost untenantable, and dangerous to health, and the trustees deemed it necessary to take out the old plumbing and replace it with new, at an expense of $1000. The court directed an apportionment. It might be worthy of consideration, in connection with this case, whether the fact, established to the satisfaction of the court, that the premises were in such condition that the authorities would have compelled the changes if they had not been made voluntarily, would not bring the case under subdivision (1) *supra*, as in effect an outlay made under compulsion. In *Matter of Martens*, 16 Misc. 245, it was held that where, and in so far as a trustee with power to sell and reinvest is authorized to delay a sale of unproductive property, in order to secure a more favorable market, and thus increase the corpus of the trust estate, the proper expenses of such a course, including ordinary taxes, may be charged against the corpus, citing as authorities upon the adjustment of interests in case of delayed sales, *Cram* v. *Cram*, 2 Redf. 244 ; *Matter of Kendall*, 4 Dem. 133 ; *Matter of Housman*, 4 Dem. 404 ;

Covenhoven v. *Shuler*, 2 Pai. Ch. 122 ; *Cairns* v. *Chaubert*, 9 Pai. Ch. 160 ; *Spear* v. *Tinkham*, 2 Barb. Ch. 211 ; *Lawrence* v. *Embree*, 3 Bradf. 364 ; *People ex rel. Cornell University* v. *Davenport*, 30 Hun, 177.

Though the general rule applicable to the relation of life tenant and remainderman does not authorize the former to charge the latter with the cost and expense of permanent improvements voluntarily put upon the property by him during the life tenancy, yet it is when that relation is open and acknowledged that these principles apply, and when no special circumstances exist authorizing the application of principles of equity, to reimburse one who, in good faith, has increased the intrinsic value of the property, by expending his own means in making permanent erections and valuable additions thereto, under the belief that he was its lawful owner. Such circumstances exist, for example, when a trustee, supposing, in good faith, that he has acquired title in fee to the property, goes on and deals with it as his own, and makes improvements which are of permanent benefit. *Thomas* v. *Evans*, 105 N. Y. 601 (611–612) ; *Putnam* v. *Ritchie*, 6 Pai. Ch. 390 ; *Mickles* v. *Dillaye*, 17 N. Y. 80 ; *Bright* v. *Boyd*, 1 Story, 478 ; *Wetmore* v. *Roberts*, 10 How. Pr. 51 ; *Miner* v. *Beekman*, 50 N. Y. 337 ; *Ford* v. *Knapp*, 102 N. Y. 135. And the same principle applies between a life tenant in good faith supposing himself to be an owner in fee, and one who is in fact vested with a valid remainder. *Thomas* v. *Evans*, 105 N. Y. 601 (615).

§ 443.—(6) Fees for legal expenses rendered to a trustee in litigation resulting in his appointment in place of a predecessor removed, are to be charged to corpus, *Donovan* v. *MacDowall*, 2 Dem. 213 ; and expenses allowed to the trustee in litigation or otherwise involving the safety and protection or recovery, of the property. *Matter of Young*, 17 Misc. 680. But for a case where the expense resulted from an unsuccessful attack by the beneficiary, upon the trust, see *Geissler* v. *Werner*, 3 Dem. 200. And for an illustration of a charge of legal and clerical charges upon income, under a special provision of the will, see *Matter of Young*, 17 Misc. 680.

§ 444.—(7) Premiums paid on the purchase of securities above

par are to be charged to corpus. *Matter of Pollock*, 3 Redf. 100 (116); compare *Farwell* v. *Tweddle*, 10 Abb. N. C. 94; *Bergen* v. *Valentine*, 63 How. Pr. 221. But to the effect that the trustees should establish a sinking fund from income, to meet this charge, if the premium represents a high rate of interest, see *Reynal* v. *Thebaud*, 3 Misc. 187. *Ante*, end of § 419.

§ 445.—(8) Trustee's commissions, for receiving and paying out the corpus of the estate, are to be paid from corpus. *Matter of Mason*, 98 N. Y. 527 (535); *Booth* v. *Ammerman*, 4 Bradf. 129.

(3) *Method of Apportioning Deductions.*

§ 446. **General principles.**—The cases where part or all of a given outlay is charged against the capital, may, with reference to the method of apportioning the burden, be divided into three classes. In the first, the outlay effects an actual depletion of the fund, *e.g.*, where money is spent to tear down a dangerous building, under orders of the building department. This expense is a dead loss. In the second class, the outlay constitutes a mere shifting of investments, *e.g.*, where the trustee uses available funds to put in tenantable condition buildings received by them in an untenantable condition. Here there is no loss, but a mere change of form. In the third class, the outlay effects an increase in the value of the estate, *e.g.*, where, under a power to invest and reinvest, the trustee uses available funds to erect buildings on vacant trust land, and thereby increases the aggregate value of the total. The authorities to be discussed are not sharply classified on these lines, but frequently refer to the fact of net loss, net gain, or mere change of form with no loss or gain, as an element to be considered. The method to be adopted, in cases where outlays are to be apportioned between the trustee of a life estate and the remainderman, has been considered in numerous cases, but the law is in an unsettled condition.

The two rules which appear to contend for supremacy are these: On the one hand, that the total outlay should be charged to capital, as the life tenant thereby becomes automatically charged with his due portion of the burden, by virtue of the resulting reduction of income due to the depletion of the fund; on the other hand, that the respective interests of the life tenant

and remainderman in the estate should be first determined, by reference to the life tables, and thereupon the outlay in question should be apportioned accordingly, the life tenant's share being subtracted directly from income, and the remainderman's from capital. In *Peck* v. *Sherwood*, 56 N. Y. 615, sometimes cited as authority for a much broader rule, the actual decision was that where a life estate in land is vested beneficially in one person, and the remainder is vested in another in trust, the trustee of the remainder is authorized to unite with the life tenant in an outlay to protect the property; and if the trustee also has in hand on the same trust available funds, in which the life tenant of the land has no interest, the proper course is to charge upon these available funds the trustee's *proper portion* of such outlay. Several points here call for attention. First, the remainderman (the trustee) united in incurring the charges. In cases of apportionment, this is a very unusual feature. Second, the question of apportionment arose on the accounting of the remainderman, and the court merely held that he was authorized to incur the given expense to the extent of his *pro rata* interest in the property, and to charge it to the available capital in his hands. Third, the decision involved the proposition that on the facts presented the other portion of the expense was merely a general charge on the life tenant personally. But fourth, and this is of special importance, the real estate on which the outlay had been made was the only property in which the life tenant and the remainderman (trustee) were both interested, the money fund being bequeathed directly to the trustee, on the same trust as the remainder in land, unaffected by any life estate. It was on these facts that the method was adopted of apportioning the expense by charging exclusively upon capital one portion, leaving the other portion exclusively as a personal liability of the life tenant. It will be seen that it would have been impracticable in that case, to effect an automatic adjustment by subtracting the entire expense from the capital, and thus reducing *pro tanto* the income of the life tenant. For neither trustee nor court could have sold or mortgaged the absolute life estate to raise a fund for such a purpose, and there was no other fund save that in which the life tenant had no interest. To subtract the entire expense from that fund would thus have freed the life tenant from any portion of

the outlay. The only course open, therefore, was to ascertain the proper respective proportions, and allow the trustee's portion to be charged on the available capital in his hands, leaving the other portion resting upon the life tenant to dispose of as he saw fit. Fifth : In the *Peck* case, the court does not discuss the method of determining the respective interests, but merely directs the trustee to pay a *proper* proportion. It will be assumed, however, that the court intended to indicate the method which thereafter the surrogate, when the case again came before him, in fact adopted (see statement in *Matter of Housman*, 4 Dem. 404, 409), namely, to ascertain the life tenant's interest in the real estate according to the Northampton tables, and taking the difference between that sum and the total value of the property as the interest of the remaindermen, to make the apportionment upon that basis. In *Stevens* v. *Melcher*, 80 Hun, 514 (522–525), the situation was a much more common one, and very different from that in the *Peck* case. Here the trustee held in trust both real and personal property, all affected by a right in a remainderman. For an outlay upon the realty, which was held to be apportionable between the life tenant (trustee) and the remainderman, the court held that the total expense of $33,000 should be charged to capital, for the reason that in this way it would be automatically apportioned, through the corresponding loss of income, *pro tanto*, to the life tenant. In this case, it will be seen, the trustee and the remainderman were both concerned in the same fund, consisting both of realty and personalty, in this respect differing radically from *Peck* v. *Sherwood*, *supra*. It was, therefore, practicable, as in the *Peck* case it was not, to effect an automatic adjustment of the respective rights by charging the total expense to capital, and thus reducing both the capital and the income. So also a loss on an authorized investment by a trustee is as between the life tenant and remainderman, charged to capital, thus automatically charging the life interest of the beneficiary *pro tanto*, through loss on income. *Whittemore* v. *Beekman*, 2 Dem. 275 (283). So if, as in another branch of the *Stevens* case (80 Hun, p. 525 *et seq.*), the outlay has effected a corresponding increase in the value of the improved realty, a charge of the outlay to the extent of the entire permanent increase may also be properly made against capital, as in effect a mere

shifting of investment from personalty to realty, while any balance over and above permanent increase may be charged directly on income. *Id.*, p. 535. Compare *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231 (240–242). The same rule was adopted in *Matter of Deckelmann*, 84 Hun, 476, where the court, at the instance of the beneficiary of the trust, directed the trustee to make certain permanent improvements and charge the expense to principal. The court do not refer specifically to the fact that this would or might reduce the net income, and thus impose upon the beneficiary a portion of the burden, but they refer to and approve the reasoning and the conclusion of Judge Parker in *Stevens* v. *Melcher*, *supra*. Also *Gillespie* v. *Brooks*, 2 Redf. 349 (364).

The distinction between the *Peck* case and the *Stevens* case seems to have been overlooked in *Matter of Housman*, 4 Dem. 404, where the interests of the life tenant (in trust) and remainderman centred in the same corpus, and where accordingly a charge of the entire sum upon the corpus, as in the *Stevens* case, would have effected an automatic adjustment. The court, however, followed the rule in the *Peck* case, thus throwing on the life tenant a double burden:—first, the loss of the *pro rata* amount subtracted bodily from income, and secondly, the loss, *pro tanto*, of income due to depletion of the corpus by the charge apportioned to the remainderman. The same remark applies to *Matter of Miller*, Tucker, 346 (criticised in *Gunning* v. *Carman*, 3 Redf. p. 72), to *Matter of Young*, 17 Misc. 680 (690), and apparently also to *Cromwell* v. *Kirk*, 1 Dem. 599 (604). In the *Cromwell* case, the life tenant had already died, and the question was how to apportion the amount to be contributed from her estate. It was therefore necessary to fix upon a specific sum, and the surrogate resorted to the life tables, with a view of ascertaining what her chance of life was at the date of the outlay. This involves an application of the rule in the *Peck* case, while it is submitted that the rule applicable was that of the *Stevens* case, according to which, if the expenditure in question was originally made from the corpus, the matter had, at her death, completely adjusted itself, while if the expenditure was originally subtracted from income, the same should be restored to her estate as of the date of her death, and charged to the re-

mainderman as of that date, the life tenant in either case having contributed her share through loss of income on the amount of the outlay. Thus in neither case would a reference to the life tables be called for. *Gunning* v. *Carman*, 3 Redf. 69 (73). The life tenant, in all such cases, would thus lose all the annual income of the amount expended during life, while the remainderman, while ultimately obliged to pay the principal sum, would be entirely freed from payment or loss of income thereon until he came into possession. In *Matter of Laytin*, 2 Con. 106, the facts apparently justified the application of the rule in the *Peck* case, and a resort to the life tables, for there testator had devised to his wife for life a house and lot, and bequeathed to her an annuity of $7000. It does not appear that the person entitled to the remainder in the house was also entitled to the fund held by the trustees to provide the annuity. The only method, therefore, of effecting any part of the charge against the life tenant, in favor of the remainderman, without a sale of the house, was to subtract it directly from income. The case is a difficult one to discuss, because it does not appear why the trustees of the annuity fund had any authority to effect repairs at all on a house in which they had no title either for life or in remainder.

If an outlay neither adds to nor subtracts from the permanent value of the estate, as a whole, and does not reduce the total income, it would seem that if authorized on behalf of the estate at large it should be charged to capital, in which case neither life tenant nor remainderman would lose anything, while if charged in any degree directly to income, the loss thus effected to the life tenant would accrue *pro tanto* to the profit of the remainderman. See *Stevens* v. *Melcher, supra.* If, however, the outlay effects both a permanent increase in the value of the estate, and an increase in income, a charge of the entire outlay on capital would entirely relieve the life tenant of a fair share of the expense of which he receives his share of profit. In such case an ascertainment of respective interests and a direct charge of the life tenant's share upon income would appear just. But see *Stevens* v. *Melcher*, and *Matter of Deckelmann, supra.* This point is dealt with in *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231 (240–242), where certain buildings on Cedar Street were left in trust with remainder over. The city, in widening the street, cut off ten

feet in front. The court directed that the expense of erecting warehouses on the lots be paid from the available capital; that out of the rents, 6 per cent on the cost of the buildings be reserved, together with a reasonable allowance for the natural depreciation and wear and tear of the buildings until the life estates should fall. "In this way the tenant for life will receive the 'net receipts and profits' of this portion of the estate, and, in the meantime, the money expended in buildings will be a safe investment and drawing interest, . . . and upon the determination of the life estates, those to whom the money invested will belong come into the possession of the same, in the permanent improvements upon the lots—somewhat lessened in value, it is true, but the depreciation compensated for in the allowance made for the purpose. This appears to be just and equitable on both sides. . . . The master must ascertain the probable duration of the lives, taking an average of the three" (there were three beneficiaries of the trust, one third of the estate vesting on the death of each) "and how much less the buildings will be worth at that time, from natural causes or ordinary use, than when new; and this amount he must apportion to be paid out of the rents in such manner as may be just." It would appear from the direction to reserve full interest on the cost, out of the rents, that the life tenants were not entitled to the income on the fund used for building. Compare *Stevens* v. *Melcher*, 80 Hun, 514 (525 *et seq.*).

§ 447. **Summary.**—The authorities just discussed illustrate the conflict between the two rules already referred to affecting the method to be adopted in apportioning, as between a life tenant (trustee) and the remainderman, payments for assessments and other charges held to be apportionable. Some of the cases hold, that the whole payment should be charged to capital, on the theory that thereby the life estate, through loss of income on the amount spent, pays the carrying charges, while the remainderman ultimately receives the capital less the sum expended but plus the corresponding improvement effected; with the modification that if the improvement thus effected is not wholly permanent, an annual sum, adjusted by reference to the life tables, should be directly subtracted from income and added to capital,

sufficient to form a sinking fund to make good to the remainderman any loss from wear and tear during the trust term. This rule seems adapted to effect exact justice to both parties in a convenient manner, and to spread the charge upon income over the entire term of the trust. Other cases hold that the life tables should be referred to to determine the respective interests of the trust estate and the remainder, and that only the share of the latter should be charged to capital (thus cutting off the trust income *pro tanto*) while the share of the trust estate should be charged to income, thus further reducing the receipts of the beneficiary. In other words, the trust estate pays interest on the entire expense (which is just) and also pays a share of the principal (which will frequently be unjust). For if the case is one where no wear and tear, or depreciation, in the permanent improvement, is probable, it is obviously improper that the trust estate should do more than keep down interest—which would be effected by charging the whole expense to capital. If there is to be wear and tear, and depreciation, justice requires that the trust estate should be charged therefor by means of a graduated or an average annual deduction from income for a sinking fund (see *Reynal* v. *Thebaud*, 3 Misc. 187), and not by charging the total estimated depreciation in a lump, and taking it from income bodily.

The apparent conflict between the authorities may be explained as follows: (1) There are cases of life tenancy and remainder, one of which is in trust, where it is proper to ascertain the respective interests of the two estates, and allot the principal expense accordingly, and take out bodily from the capital of the trust estate its proper share, and no more; *e.g.*, where it is the remainder that is the estate in trust, and the trustee holds on the same trust available funds in which the life tenant has no interest, but no available funds on which the life tenant has an interest. Here, obviously, the *pro rata* share of the trust remainder, and no more, should be charged to the available trust funds. This effects no loss of income on the life tenant, and hence he must be left burdened with his full *pro rata* share. *Peck* v. *Sherwood*, 56 N. Y. 615. Misapprehension of the point decided in this case is one cause of the misapplication of the rule allotting proportionate shares of the principal expense to capital and in-

come respectively. (2) There are other cases, *e.g.*, where the life estate has already ceased, and where, accordingly, an adjustment of fixed sums to be respectively charged is called for. These also seem to have been erroneously regarded as authorities for a similar course pending the trust term. *Gunning* v. *Carman*, 3 Redf. 69 (73); *Cromwell* v. *Kirk*, 1 Dem. 599 (604). (3) Still other cases involve no trust at all, and call for a summary adjustment of respective liabilities and a final settlement at once and for good. Thus, in *Williams* v. *Cox*, 3 Edw. Ch. 178, a widow filed a bill for dower in rents of lands held under a lease from her husband. There was an assessment on the land. There was no method by which it could be charged to capital thus effecting an automatic *pro tanto* decrease in rents. The court held that the assessment should be paid by the heirs, and that one third of the interest thereon should be deducted from the rents to be assigned to the widow. Such cases afford a misleading analogy where there is a trust fund in court, a direct charge upon which of the total expense to be adjusted will automatically effect a charge upon the trust to the extent of the interest on the expense. Even in cases where no trust is involved, but where opportunity offers to effect an indirect and equitable apportionment by throwing the principal charge wholly on capital in hand, the courts will so adjust the burden. Thus in *Swaine* v. *Perine*, 5 Johns. Ch. 482 (491 *et seq.*), a widow filed a bill for assignment of dower and mesne profits; the heir had been obliged to pay off a mortgage to which the dower interest was subject. The decree gave the widow one third of the land, and mesne profits, less her ratable contribution toward the redemption of the mortgage. The court held that in view of her getting her third freed from the mortgage, she ought to pay interest on one third of the mortgage debt paid by the heir, but as this method would be inconvenient and embarrassing, the direction was that the value of such annual payment for her life should be computed and subtracted from the mesne profits, any excess to be subtracted from the dower assigned. So in *Stilwell* v. *Doughty*, 2 Bradf. 311, where there was no trust, a sewer assessment was wholly charged on the remainderman, and the life tenant was directed to pay interest, the result corresponding to that where an outlay is charged wholly on the capital of a trust fund, thus

reducing the income of the trust. The rules to be applied where an outlay is such as not to reduce either the estate or the income, or is such as to increase both, have already been considered.

§ 448. **Mortgage or sale.**—Where funds must be raised for the due protection or improvement of the estate, and none are available except through sale of a portion of the realty, or a mortgage, the trustee may, either with or, it seems, in some cases, without the direction of the court, according to circumstances, effect a sale or mortgage of the trust estate, and use the proceeds. *U. S. Trust Co.* v. *Roche*, 116 N. Y. 120; *Matter of Deckelmann*, 84 Hun, 476 (477). But see *Losey* v. *Stanley*, 147 N. Y. 560. *Ante*, § 182; *post*, § 458. See the present statute, Real Prop. L., § 85.

§ 449. **Devastavit.**—If a portion of the total trust property, including corpus and accrued rents, is missing, through the fault of the trustee, and there is no direct evidence whether it has been subtracted from corpus or income, the nature of the respective funds, and the comparative ease of disposing of one, or the other, may be considered, to some extent. *Cook* v. *Lowry*, 95 N. Y. 103 (112–113).

(4) *Apportioning Rents and Annuities.*

§ 450.—As to rents, and annuities, and their apportionment, as between the trust estate and that of the creator of the trust, or between the trust estate and that succeeding it, a brief review of the history of the law is necessary. Under the common law,

(*a*) If a person having a life estate, with no power to lease beyond his own life, should make a lease for years, reserving rent in instalments, as, half yearly, and should die in the middle of a half year, thereby terminating the lease, the rent from the last pay day to his death was entirely lost. *Marshall* v. *Moseley*, 21 N. Y. 280 (282). This presented a case where the rent-yielding lease, and not merely the lessor's interest in it, was terminated by his death; and the principle determined not who should receive the rent, but that no rent was payable.

This rule was changed by 11 Geo. II., c. 19, § 15, and in New York, 1 R. L. 438, 1 R. S. 747, § 22, now Real Prop. L.,

§ 192, enabling the executor or administrator of the lessor dying before the first rent day or between two rent days, to recover the proportion of rent accrued before such death.

(*b*) An entirely different case was presented where one was entitled to receive rents under a lease in such manner that while his own interest therein was terminated by his death, or by any other means, yet the lease itself was not thereby terminated. Here, if he died between pay days the rent did not cease, and the question was, to whom it should be paid. In such a case, the common law allowed no apportionment. Thus if, after making a lease, the owner devised a life estate and a remainder, subject to the lease, and the life estate terminated between pay days, the next payment belonged to the remainderman. *Marshall* v. *Moseley*, 21 N. Y. 280. This principle also was abrogated in England by 4 and 5 Wm. IV., c. 22, which provided that all rents and all other payments made payable at fixed periods under any instrument executed after the passing of the act, should be apportioned so that on the *termination* by death or any other means, of the estate of the person entitled to such rents, such person, or his representative, should have a portion of such rents, according to the time elapsed since the last period of payment. Other provisions prescribed the method of recovery and apportionment. In 1875, a similar statute (L. 1875, ch. 452) was adopted in New York. It is now found, with certain immaterial changes of phraseology, in Code C. P., § 2720, which provides that "all rents reserved on any lease made after June 7th, 1875, and all annuities, dividends and other payments of every description made payable or becoming due at fixed periods under any instrument executed after such date, or, being a last will and testament that takes effect after such date, shall be apportioned so that on the death of any person interested in such rents, annuities, dividends or other such payments, or in the estate or fund from, or in respect to which the same issues or is derived, or on the determination by any other means of the interest of any such person, he, or his executors, administrators or assigns shall be entitled to a proportion of such rents, annuities dividends and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof, as the case may be, including the day of the death of

such person, or of the determination of his or her interest" after making proper allowances and deductions. This act also provides for the method of collection and apportionment. By its terms, it does not apply where otherwise expressly stipulated, nor to policies of insurance. In its phraseology it was borrowed bodily, with slight and here immaterial changes, from the English act above cited. The law on the subject of annuities prior to 1875 is discussed and illustrated in *Kearney* v. *Cruikshank*, 117 N. Y. 95. In that case, the question arose over an annuity, where the annuitant died between pay days. It was an annuity payable by trustees under an express trust. It was held that under the prior law, which governed that case, the Act of 1875 not being retroactive, there was no apportionment, while, if the will creating the trust had gone into effect subsequent to the passage of that act, the annuity would have been apportionable. The old rule was held to apply not only where the annuity was payable on dates specifically fixed, but also where the dates for its payment were fixed by the law under the principle rendering annuities payable at the end of each year, and the court express the conviction that the Act of 1875 changes the rule in both cases by its reference to annuities "made payable or becoming due at fixed periods." See also *Irving* v. *Rankine*, 13 Hun, 147, aff'd, it seems, in 79 N. Y. 636. The law as to rents, prior to 1875, is discussed and illustrated in *Marshall* v. *Moseley*, 21 N. Y. 280. See also *Devoe* v. *Van Vranken*, 29 Hun, 200; *Miller* v. *Crawford*, 26 Abb. N. C. 376; *Matter of Weeks*, 5 Dem. 194.

(*c*) It will have been noticed that the English statute, 4 and 5 Wm. IV., c. 22, provided for apportionment in case of a *termination* by death or otherwise between pay days, of the estate of a person entitled to the rents. Under this statute the question arose as to the meaning of the word "termination;" and it was decided that the Act only applied where the death or other cause referred to actually put an end to the interest as such of the person entitled. Thus, as in the case already stated, if an owner gave a lease, and then devised a life estate in the land, here the life tenant's death actually put an end to his interest in the estate. It was extinguished. If it occurred between pay days, the statute applied and apportionment followed. But if an estate, in-

stead of thus ceasing, merely devolved on another, it was not terminated, but merely transferred ; the statute did not apply ; and no apportionment resulted. For example, if an owner executes a lease, not extinguishable by his own death, and dies between pay days, the land passes to his heirs, or to devisees absolutely, or in trust ; the owner's estate has not terminated ; it has passed to others. In such a case there is no apportionment as between his executors and the heirs or devisees. The latter take the next payment in full. *Browne* v. *Amyot*, 3 Hare, 173 ; *Beer* v. *Beer*, 12 C. B. 60 (77) ; *Clulow's Estates*, 3 Kay & J. 689. As these decisions construing the English act antedated the passage of our Act of 1875 (now Code C. P., § 2720) which adopted its phraseology, our act is, on familiar principles, to be read as thus construed. Black on Interpretation of Laws, p. 159. And this construction of the act has in fact been specifically adopted in New York. *Matter of Weeks*, 5 Dem. 194 ; *Miller* v. *Crawford*, 26 Abb. N. C. 376. McAdam on Landlord and Tenant, 2d ed., p. 347. The statute 2 R. S. 82, § 6, now Code C. P., § 2712, subd. 7, enumerating, among assets passing to an executor, "rent reserved to the deceased which had *accrued* at the time of his death," relates to rent accrued and payable, and not to such as has accrued intermediate the pay days and is not yet payable. *Fay* v. *Halloran*, 35 Barb. R. 295. The result is that as between the executors of a testator dying between pay days and the trustee of a life estate created by the will, the trustee takes the whole of the next payment, without apportionment ; and that if the same trust ceases between pay days, the statute applies and the trustee secures a *pro rata* share of the instalment thereafter payable ; the trust is thus favored at both ends. As to apportionment of rents as between several persons who succeed as co-tenants or otherwise to the title of a lessor, see *Jones* v. *Felch*, 3 Bosw. 63 ; *Cruger* v. *McLaury*, 41 N. Y. 219 ; *Moseley* v. *Marshall*, 22 N. Y. 200.

(5) *From when and to when Computed.*

§ 451. **Under trusts.**—Legacies are not payable till the end of a year. *Cooke* v. *Meeker*, 36 N. Y. 15 (18). And no interest accrues on general legacies until that period has expired. *Id.* 23, as explained in *Matter of Stanfield*, 135 N. Y. 292. As to

specific legacies, see *Platt* v. *Moore*, 1 Dem. 191. But where the income of an estate, or of a designated portion, is given for life, the legatee is entitled to what is acquired from testator's death. *Matter of Stanfield*, 135 N. Y. 292. And this applies in express trusts of personalty, to apply the interest and income to the use of a beneficiary, irrespective of the relationship of the beneficiary to the creator of the trust. The beneficiary takes the interest acquired from testator's death to the end of the trust term. *Cooke* v. *Meeker*, 36 N. Y. 15 ; *Matter of Stanfield*, 135 N. Y. 292 ; *Barrow* v. *Barrow*, 55 Hun, 503 ; *Matter of Travis*, 85 Hun, 420 ; *Matter of Lynch*, 52 How. Pr. 367 ; *Keating* v. *Bruns*, 3 Dem. 233 ; *Matter of Devlin*, Tucker, 460 ; *Pierce* v. *Chamberlain*, 41 How. Pr. 501 ; *Powers* v. *Powers*, 49 Hun, 219 ; *Matter of Fish*, 19 Abb. Pr. 212 ; *Bullard* v. *Benson*, 1 Dem. 486 (494) ; *Matter of Barnes*, 7 App. Div. 13 ; *Matter of Benson*, 96 N. Y. 499 (511). But though interest begins to run at once, it is not payable until the end of a year, *Matter of Stanfield*, 135 N. Y. 292, unless the court grant an allowance from income already accrued and which would pass to the beneficiary's estate in case of his death. *Lockwood* v. *Lockwood*, 3 Redf. 330 (337). An annuity also runs—that is, the first instalment begins to accrue—from testator's death, and is payable at the end of the first year. *Cooke* v. *Meeker*, 36 N. Y. 15. And if made payable in equal instalments on certain designated dates, payment of the first instalment is to be made on the first of those dates after testator's death, though the intervening period is less than one of the full periods for successive payments. *Griswold* v. *Griswold*, 4 Bradf. 216 ; *Cochrane* v. *Walker*, 4 Dem. 164. So with a fund bequeathed to make good a deficiency, if any, in a subsequent sale of certain lands devised in trust. After sale, and after a deficiency is ascertained, interest is to be allowed from testator's death on so much of the fund as is required to supply the deficiency. *Rodman* v. *Fincke*, 68 N. Y. 239. Where real property is given to trustees to receive and apply or accumulate rents, the trustees, in whom the title vests, receive the rents accruing to them from the beginning to the end of the trust, for the trust purposes. *Rodman* v. *Fincke*, 68 N. Y. 239 (245–246). *Ante*, § 450. The fact that a sum given in trust is not set off and invested at once, as directed, or is not ascertainable

at once, does not prevent the subsequent allowance of interest from testator's death. *Matter of Stanfield*, 135 N. Y. 292 ; *Rodman* v. *Fincke*, 68 N. Y. 239 (246) ; *Fincke* v. *Fincke*, 53 N. Y. 528. The point from which and to which income is computed in case of change of ownership between pay days is determined according to principles discussed *ante*, § 450.

§ 452. **Under powers.**—If testator creates a testamentary power in another to appoint certain legacies, it has been held that the usual rules as to computation of interest on legacies do not apply, and that interest runs from the death of the appointor. *Dixon* v. *Storm*, 5 Redf. 419.

(6) *The Receipt of Rents and Profits.*

§ 453. **Introductory.**—The necessity for authority to the trustee to receive the rents and profits, and the principle that such authority may be implied, have been considered *ante*, § 146. The distinction between a grant of authority to the trustee to receive and apply rents, and the requirement that he shall permit the beneficiary to receive them, are discussed *post*, §§ 472, 474. The disposition of rents where the trust instrument makes no valid provision is discussed *post*, § 489 *et seq.*, and sections there cited. Under the present head two topics will be considered : (*a*) The general authority of the trustee, to lease ; (*b*) the meaning of the term "lease" under the second class of trusts.

(*a*) *Authority to Lease.*

§ 454. **In general.**—The trust instrument may specifically create a trust "to sell, mortgage or *lease* real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon." (Real Prop. L., § 76.) This is the second class of permitted express trusts. The third class, to receive and apply rents and profits, implies an authority in the trustee to lease, *Leggett* v. *Perkins*, 2 N. Y. 297 (317) ; *Corse* v. *Corse*, 144 N. Y. 569 ; *Betts* v. *Betts*, 4 Abb. N. C. 317 (385) ; and the same reasoning would seem to apply to the fourth class, to receive and accumulate. The first class, however, to sell for the benefit of creditors, must in general be inconsistent with any implied power to lease, *Matter of McCaffrey*, 50 Hun, 371 (376) ;

but it seems that there is no necessary inconsistency in every case. For example, circumstances might arise to render it obviously improper to sell forthwith, at a heavy sacrifice, and in such case an implication might be raised of authority to lease for a short term rather than have the property wholly unproductive. Wood on Landlord and Tenant, § 165 ; *Evans* v. *Jackson*, 8 Sim. 217 ; *Jervaise* v. *Clark*, 5 Madd. 96. So it has been suggested that express authority to dispose of all or *any part* of the estate, might cover a lease. *Leggett* v. *Perkins*, 2 N. Y. 297 (317–318) ; *Hedges* v. *Riker*, 5 Johns. Ch. 163 (167). So also the trust instrument, in addition to a trust for some other purpose, may confer a power in trust to lease, if not inconsistent with the trust. *Henderson* v. *Henderson*, 113 N. Y. 1 ; *Matter of Seebeck*, 140 N. Y. 241.

§ 455. **For what term.**—The most important point for consideration relates to authority to execute a lease that may continue binding after the trust ceases.

§ 456. (1) **Under a power.**—A power in trust may confer such an authority. *Matter of McCaffrey*, 50 Hun, 371 (374) ; *Fowler* v. *Mutual L. I. Co.*, 28 Hun, 195 ; *Greason* v. *Keteltas*, 17 N. Y. 491 ; also the cases cited *ante* in § 454. See *Kernochan* v. *Wilkens*, 3 App. Div. 596.

§ 457. (2) **When fee in trustee.**—So also where the trustee holds in fee (as he does under a trust of the first class, to sell ; or of the second class, to sell. mortgage or lease, which are the only trusts conferring a fee, *Bennett* v. *Garlock*, 79 N. Y. 302, 317 ; *Matter of McCaffrey*, 50 Hun, 371, 376), he has like authority, if consistent with the given trust. See *ante*, § 454. The general principle is that a trustee may lease for a term justified by the quantity of his estate ; if this is a fee, he may make a lease binding for any reasonable term. Wood on Landlord and Tenant, §§ 165, 166 ; Taylor on Landlord and Tenant, §§ 130, 131 ; Woodfall on Landlord and Tenant, Webster's Am. Ed., § 17, p. 33, note ; 1 Washb. on Real Property, 5th ed., 490. But the term must be a reasonable one, and if not may be annulled in equity. Wood on Landlord and Tenant, § 167 ;

Taylor on Landlord and Tenant, § 132 ; *Greason* v. *Keteltas*, 17 N. Y. 491. The reasonableness of the lease may depend to some extent on the customs of the locality. *Matter of Odell*, 1 Con. 94 (98). In *Greason* v. *Keteltas*, 17 N. Y. 491, *Newcomb* v. *Keteltas*, 19 Barb. R. 608, and *Ahern* v. *Steele*, 115 N. Y. 203, all three arising under the same will, the trustee held in fee, and the trust was created before 1830. The case of *Labatut* v. *Delatour*, 54 How. Pr. 435, only follows the two preceding cases. *Matter of McCaffrey*, 50 Hun, 371 (375-376). Except in trusts to lease, these principles must find at best a very limited application in trusts of the first and second class in New York. The fact that trustees are directed to convey to remaindermen at the termination of the trust, does not, in itself, give the trustees a fee. No conveyance is requisite. Though provided for, its exercise is useless. When the trust ends, the remainders vest in possession. Such a direction has no bearing, therefore, on the present question. *Gomez* v. *Gomez*, 81 Hun, 566 (570), aff'd 147 N. Y. 195 (200).

§ 458. **(3) When fee not in trustee.**—If the trustee holds under the third class of trusts to receive and apply rents ; or the fourth class, to receive and accumulate rents, he has not a fee, but a life estate ; for the trust term must be measured by lives. Real Prop. L., § 32, 50, 51, 76 ; *Losey* v. *Stanley*, 147 N. Y. 560. It may be an estate for the life of the trustee, or for that of the beneficiary or a third party and so an estate *pur autre vie*. A beneficial life tenant, whether for his own life or that of another, has no inherent power to execute a lease binding on the remainder. Woodfall on Landlord and Tenant, Webster's Am. Ed., § 4, p. (5) and p. (10) ; *Matter of McCaffrey*, 50 Hun, 371 (374). (But a power may be expressly conferred on him to execute such a lease for a term not exceeding twenty-one years. Real Prop. L., § 123.) And if the life tenant be a trustee, under the principle measuring his authority to lease by the quantity of his estate, his lease is not binding beyond the trust term. Wood on Landlord and Tenant, § 165 ; Taylor on Landlord and Tenant, § 130 ; Woodfall on Landlord and Tenant, Webster's Am. Ed., § 17, p. 33 note ; *Matter of McCaffrey*, 50 Hun, 371. In *Corse* v. *Corse*, 144 N. Y. 569, where a lease for ten years,

by trustees holding a life estate, was sustained, the trust term had not expired when the validity of the lease was attacked, and the present point was not raised. So with *Leggett* v. *Perkins*, 2 N. Y. 297. In *Betts* v. *Betts*, 4 Abb. N. C. 317 (385), the lease was made for a term extending beyond the trust, but the discussion of that feature is omitted from the report (p. 415).

§ 459. **(4) When remaindermen incompetent.**—If the remaindermen are infants, or otherwise incompetent, the legislature may authorize, and under that authority the court may in a proper case direct, the leasing of their real property. See Code C. P., § 2348 *et seq.*; *Gomez* v. *Gomez*, 147 N. Y. 195 (201 *et seq.*); *Hedges* v. *Riker*, 5 Johns. Ch. 163. But proceedings to that end, affecting the remainder limited on the trust estate, must be taken under the Code provisions solely. *Losey* v. *Stanley*, 147 N. Y. 560 (573). Therefore where there is a trust for a life or lives, with remainder to such incompetent persons, the difficulty may be removed.

§ 460. **(5) Inherent power of court.**—But if the remaindermen are not incompetent, it appears clear that the court, in the absence of statutory authority, cannot confer such a power on the trustee of a trust for a life or lives. *Gomez* v. *Gomez*, 147 N. Y. 195; *Losey* v. *Stanley*, 147 N. Y. 560.

§ 461. **(6) Power of the Legislature.**—The remaining point is, whether the Legislature can authorize the court to grant such power to the trustee, where the remaindermen are not incompetent. If any such attempt has been made by the Legislature, it was embodied in L. 1895, ch. 886, for which § 86 of the Real Property Law has now been substituted. The latter provision is as follows: "A trustee appointed to hold real property during the life of a beneficiary, and to pay or apply the rents, income and profits thereof to, or for, the use of such beneficiary, may execute and deliver a lease of such real property for a term not exceeding five years, without application to the court. The Supreme Court may, by order, on such terms and conditions as seem just and proper, in respect to rental and renewals, authorize such a trustee to lease such real property for a term exceed-

ing five years, if it appears to the satisfaction of the court that it is for the best interest of the trust estate, and may authorize such trustee to covenant in the lease to pay at the end of the term, or renewed term, to the lessee the then fair and reasonable value of any building which may have been erected on the premises during such term. If any such trustee has leased any such trust property before June fourth, eighteen hundred and ninety-five, for a longer term than five years, the Supreme Court, on the application of such trustee, may, by order, confirm such lease, and such order, on the entry thereof, shall be binding on all persons interested in the trust estate." Real Prop. L., § 86.

§ 462. **(7) Scope of the statute.**—If this statute purports to empower the trustees of existing trusts, either with, or without, authorization from the court, to execute leases which shall bind adult and competent remainderman, it would appear to be unconstitutional. *Powers* v. *Bergen*, 6 N. Y. 358; *Brevoort* v. *Grace*, 53 N. Y. 245; *Embury* v. *Conner*, 3 N. Y. 511 (516, 517); *Gilman* v. *Tucker*, 128 N. Y. 190 (199); *Matter of Deansville Cemetery Asso.*, 66 N. Y. 569 (573); *Wynehamer* v. *The People*, 13 N. Y. 378 (393); *People* v. *Havnor*, 149 N. Y. 195 (199); *Bertholf* v. *O'Reilly*, 74 N. Y. 509 (515); *Matter of Application of Jacobs*, 98 N. Y. 98 (105). It is decided that L. 1886, ch. 257 (L. 1895, ch. 886; now Real Prop. L., § 85, being the section immediately preceding the one now under discussion) which empowers the Supreme Court to authorize a sale or mortgage by the trustee, in certain cases, is confined in its application to the estate held by the trustee, and does not affect the remainder, and that the Legislature would have no power to authorize, for private purposes, the sale or mortgaging of an estate owned by adult and competent remaindermen except to pay taxes and assessments. *Losey* v. *Stanley*, 147 N. Y. 560 (572). *Ante*, § 182. The court held in that case that the statute was not intended to attempt this impossible result, and relied to some extent, on that point, on the fact that the statute required notice of the application for leave to sell or mortgage to be given only to the beneficiaries of the trust. That feature, now found in Real Prop. L., § 87, relates at present to leases, as well as to sales and mortgages. There is, however, this distinction between the two cases: that

the trustee had, apart from the statute, no power, and could gain none from the court, to sell even the life estate, nor, save in certain exceptional cases (*ante*, § 181), to mortgage it. The statute, therefore, providing for sale or mortgage, even of the trust estate, had a purpose. But the trustee did, apart from any special statute, have power to lease the trust estate for the trust term. If this is all § 86 of the Real Property Law gives, it was unnecessary. If it meant to affect the remainder, it is unconstitutional. Perhaps it may be construed as restrictive, and as meaning that whereas the trustee possessed the power to make a lease for the full trust term, he should now be confined to leases for five years, subject to the earlier termination of the trust, and that to a lease for the full trust term, or a lease providing for renewals, he must secure the direction of the court. Further, if the statute is intended to apply only to estates thereafter created, and to sanction leases binding on the remainder, it might be supported as a permissible regulation of estates in property, or of the principles affecting succession. See *N. Y. & Oswego M. R. R. Co.* v. *Van Horn*, 57 N. Y. 473 (477). It is to be noticed that, however construed, §§ 85 and 86, relating to sales, mortgages and leases, are sweeping in character, and seem to apply even where such dispositions are expressly forbidden by the trust instrument.

§ 463. To what trusts the statute applies.—Another distinct question raised by § 86, relating to leases, is this: By its terms it only applies to "a trustee appointed to hold real property during the life of a beneficiary, and to pay or apply the rents, income and profits thereof," etc. If this phrase is intended to cover the entire third class of trusts, it is unfortunately worded. For the third class (Real Prop. L., § 76) is thus defined: "To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject," etc. Now (1) if the phrase in § 86, "to hold real property during the life of a beneficiary" is, like the phrase in § 76 "to receive . . . and apply to the use of any person during the life of that person," to be construed to cover trusts measured by the life of a third party (a point which possibly raises no serious difficulty), yet (2) it seems

difficult to stretch the meaning of the phrase "during the life of a beneficiary," in § 86, to cover the same ground as the words "during the life of that person, *or for any shorter term*" in § 76. In other words, a trust may be created under § 76, to receive and apply the rents *either* for life *or* a less term; while a lease may be executed under the literal terms of § 86, only when the trustee is appointed to hold the property for *a life*. The actual meaning of the statute on this point is certainly not free from obscurity. Section 86, relating to leases, appears to have no bearing on trusts for accumulation, as they are not trusts to apply rents. Probably that class of trusts so far as affects the interests in remainder of the beneficiary, who must, of necessity, be an infant (Real Prop. L., § 51) is covered by Code C. P., § 2348 *et seq.* relating to sale, mortgage or lease of the property of infants; on this point see also Real Prop. L., § 50, providing that a disposition of future rents and profits shall be governed by the rules for future estates.

§ 464. **Renewal clause.**—Trustees who do not hold in fee have no power, after the trust ceases, to renew leases made by them pending the trust, nor, in the leases thus made, to provide for renewals after the termination of the trust. *Gomez* v. *Gomez*, 147 N. Y. 195 (200, 201). If they do hold in fee, the propriety of inserting renewal clauses must be determined according to its reasonableness in the given case. *Greason* v. *Keteltas*, 17 N. Y. 491. If the case is one where the court may, and does, authorize a lease extending beyond the trust term (as, where the remaindermen are infants) it may also authorize a renewal clause, which is binding on the remaindermen, and may be enforced, after the trust has ceased. And so, though the infant remaindermen have only a contingent remainder, which is in fact cut off under a beneficial power of appointment executed in their favor, so that they take not as remaindermen under the original instrument, but as appointees under the power, and where the donee of the power, who thus exercised it in their favor, has joined in the execution of the lease. As they take under his appointment, they take subject to the burdens duly imposed by him. And so, even though the donee appoint not to them directly, but to trustees to their use. *Gomez* v. *Gomez*, 147 N. Y. 195.

Although parties acting in the capacity of trustees only are not ordinarily under any obligation, in executing the duties of their trust, to enter into any personal covenants in relation to the trust property, yet when they voluntarily do so they are not only themselves bound to perform such covenants, but those who succeed to their rights as trustees are also bound by valid covenants, so long as they retain the control of the property to which they relate. See Real Prop. L., § 222. The relief afforded may be by way either of specific performance, accounting, or damages, according to the case made out. *Greason* v. *Keteltas*, 17 N. Y. 491; *Fowler* v. *Mutual L. I. Co.*, 28 Hun, 195. And even if the successors are not technically the survivors or substitutes in the trust function of the original trustees, yet they may take subject, in this respect, to the obligations already imposed. *Gomez* v. *Gomez*, 147 N. Y. 195 (200). As to the liability of the respective parties for a nuisance on property held subject to a lease executed by trustees, and extending beyond the trust term, see *Ahern* v. *Steele*, 115 N. Y. 203.

§ 465. **When executed by guardian.**—Where a lease is directed by the court acting for the protection of infants, it may appoint a guardian to execute it, or may empower the trustees of the present trust estate to do so. *Gomez* v. *Gomez*, 147 N. Y. 195 (202).

§ 466. **If property held in shares.**—The trust may contemplate a division of the property into separate portions, each to be held on a distinct trust. Various illustrations of the bearing upon such trusts of the trustee's power to lease, are found in the reports. *Matter of McCaffrey*, 50 Hun, 371 (376); *Corse* v. *Corse*, 144 N. Y. 569.

§ 467. **Lease not essential.**—The leasing of trust property is not essential in all cases of trusts to receive rents. The trust instrument may authorize the trustee, under a trust to receive and apply rents, to occupy and manage it and thus produce an income. *Downing* v. *Marshall*, 23 N. Y. 366 (376–377). So the trustee, whether specifically authorized or not, may permit the beneficiaries of such a trust to occupy, and thus enjoy the use. (*Post*, § 472 *et seq.*)

§ 468. **Invalid lease—Tenant's liability.**—Where trustees are given power to lease, but a lease, as for a ten years' term, is invalid because not duly executed, the tenant, if he goes into possession, is liable as on a lease from year to year. *Kernochan* v. *Wilkens*, 3 App. Div. 596.

(b) Leases under the Second Class.

§ 469. **In general.**—Under the second class of express trusts, to sell, mortgage or *lease* real property for the benefit of annuitants or other legatees, or to satisfy any charge thereon, the rents received under a lease constitute a fund in the hands of the trustee which he uses as a general trust fund to pay off legacies or charges. It makes no difference as to the validity of the trust, whether the sale (or mortgage or lease) is for the benefit of a sole legatee or for that of several. *Skinner* v. *Quin*, 43 N. Y. 99 (106).

§ 470. **Meaning of "lease."**—In *Hawley* v. *James*, 16 Wend. 60 (152 *et seq.*) the following view of a trust to lease, under the second class, was expressed by Bronson, J. : The provision as to *leasing*, in the second class must not be understood to imply the right to receive rents and profits. The maxim *noscitur a sociis* should be applied, and a meaning given to it implying alienation, if possible. Thus, it would cover leases of the land to beneficiaries or to creditors at a nominal rent, for a term sufficient to satisfy the legacy or debt ; or leases to third persons, reserving the rent to the legatee or creditor. Or the term could be sold outright for a gross sum. They are trusts to sell land or some interest in it. The trustee does not hold for a term, and the land need only remain in his hands until a purchaser can be found who is willing to take it on reasonable terms. Such is Judge Bronson's statement. It would seem, by analogy to the decisions on a similar point under the third class, that the trust to lease must be so constituted as to give the trustee the right to receive the rents ; but that he might, in the exercise of his discretion, adopt the method of renting to creditors or legatees. The same view of the statute is taken in *Cowen* v. *Rinaldo*, 82 Hun, 479 (484 *et seq.*). It is there held, that a devise in trust to receive the rents, and therefrom pay legacies, taxes, etc., and mortgages

affecting the land, is invalid because not for a statutory purpose, on the ground that it must fall, if at all, within the second class of trusts, and that that class does not permit a trust to receive rents, but only to dispose of the whole or a portion of the estate, either by way of sale, mortgage or lease, for a lump sum, or by way of a lease to the beneficiary, or reserving the rent to the beneficiary. This is believed to be an erroneous view of the statutory meaning. In the first place, if the second class of trusts does authorize a trust to lease and receive the rents and apply them to the payment of legacies and charges, then a trust to "receive the rents" for that purpose would be equivalent to a trust to "lease," and would fall within the statute. This is settled by the cases relating to the third class of trusts. So that trusts "to lease and receive rents" and trusts merely "to receive rents," may here be considered together. That such a trust, for the purpose of paying annuities or other legacies and charges, may be validly created, seems to result from the following considerations: (1) The statute allows trusts "to sell, mortgage or lease real property for the benefit of annuitants, or other legatees, or for the purpose of satisfying any charge thereon." Real Prop. L., § 76. Judge Bronson's theory is that no trust for any of these purposes authorizes the receipt of rents and profits, and that no trust to receive rents and profits for any purpose whatever can be created except for the purpose of applying them or accumulating them, under the third or fourth classes. *Hawley* v. *James*, 16 Wend. 60 (153). This view entirely overlooks 1 R. S. 729, § 56, now Real Prop. L., § 77, which provides that a devise of land in trust to be sold or mortgaged, where the trustees are not also empowered to receive the rents and profits, fails as a trust and is only valid as a power. That is, authority to receive rents and profits is essential to the validity of a testamentary trust to sell or mortgage. By analogy it would seem that the same power was contemplated in trusts to lease, but was not specified because the nature of the trust implied it. (2) The point is made in the two cases last cited, that a trust to receive rents would effect suspension; that it is settled that trusts to sell, mortgage and lease do not effect suspension; therefore they do not involve the receipt of rents. But as just seen, a trust to sell or mortgage requires authority to receive rents, and yet does not

involve suspension. And in particular, trusts to receive rents and therefrom pay legacies and charges cannot possibly effect suspension, because the beneficiaries may release and thereby terminate the trust. *Duvall* v. *E. E. L. Church*, etc., 53 N. Y. 500 ; *Williams* v. *Montgomery*, 148 N. Y. 519 ; *Mott* v. *Ackerman*, 92 N. Y. 539 (550) ; *Greenland* v. *Waddell*, 116 N. Y. 234 (246) ; *Beardsley* v. *Hotchkiss*, 96 N. Y. 201 (214) ; *Everitt* v. *Everitt*, 29 N. Y. 39 (77, 78) ; *Miller* v. *Emans*, 19 N. Y. 384. And as soon as the beneficial interest is annulled the trust ceases. It is in this respect that a trust to sell, mortgage, *or lease*, differs from a trust to apply rents to the use of a beneficiary who is by statute forbidden to release. Under a trust to lease and receive rents and apply them to paying off legacies, annuities and charges, a conveyance by the trustee, the beneficiaries and the persons entitled to the land subject to the trust could be made at any time. The view adopted in the cases above cited is also illustrated in *Matter of Fisher*, 4 Misc. 46. But compare *Parks* v. *Parks*, 9 Pai. Ch. 107, aff'd N. Y. Comm. Adv. Jan. 3, 1843 (see 2 N. Y., p. 320).

(7) *The Application of Rents.*

§ 471. **Introductory.**—This subdivision deals only with the third class of trusts, *i.e.*, to receive and apply rents. The statutory term "apply" the rents and profits to the use of a person for life, etc., has given rise to much discussion. The chief questions have related to the method intended—whether the trustee must necessarily see to the application of every dollar, himself, or may, or must, turn the rents over to the beneficiary to be used by the latter as he sees fit ; and whether the trustee must receive the rents and income in cash, and in that form pay or apply them, or may effect such payment or application indirectly by permitting the beneficiary to occupy or enjoy the use of the land or fund.

§ 472. **Method of application.**—Some light is thrown on what the statute authorizes the trustee to do in executing the trust, by the decisions establishing what the statute authorizes the creator thereof to do in creating it. The trust instrument may specify, to some extent, the particular use to which the trustee shall put

the rents. In the early case of *Leggett* v. *Perkins*, 2 N. Y. 297, the opinions go very far in their doctrine. The particular point decided was that a trust to receive and *pay* rents, is valid, the direction to "apply," in terms, being unessential. Gardiner, J., in his opinion, says that the statute does not require the creator to use its own term "apply," and thus delegate to the trustee the sole discretion as to method of application ; that the intention was merely to provide that the trust must require the application of the rents to the use, in some form, of the beneficiary, leaving it to the creator, if he chose, to specify the particular use, and if not, then to the discretion of the trustee ; that for example, the creator may confine the application of the rents to the mere "education" of the beneficiary, which is one use. A majority of the judges concurred in holding valid the trust in question, to receive and *pay over*. The doctrine set forth by Gardiner, J., has either been narrowed by the subsequent cases, or is to be understood in a sense somewhat more restricted than might appear from a casual reading of his opinion. It is certainly not true that in all cases "the creator of the trust may direct specifically the performance of those things, which the trustee, whose authority is derived from him, might himself perform, in the lawful execution of the trust, if no specific directions were given." Thus, in the absence of directions, the trustee may permit the beneficiary to occupy the land ; but a direction in the trust instrument that he shall permit such occupation, vitiates the trust. The point is, that the statute contemplates the trustee as the owner of the estate, and vested with the whole title, and charged with the duty of active control ; but a title with no power to enter, or control, or lease, or collect rents, would, under the theory of the statute, be an anomaly. It is not anomalous to permit the legal owner charged with the active management to suffer another to occupy, but it is anomalous to compel him to do so. Another form of statement is, that the statute permits only active trusts, while if title be given to a trustee, and the absolute right to occupy and control the premises to the beneficiary, the trust is passive. Some remarks in the opinion referred to indicate that Gardiner, J., did not intend his sweeping words to have their full effect. However that may be, it is well settled that anything in the trust instrument that

interferes with the trustee's right to hold the land, and receive the rents, vitiates the trust. Apart from this, it may perhaps be true that the creator may direct the particular method in which the rents, *after the trustee has received them*, shall be applied to the beneficiary's use. Just how far even this is true, does not appear to be well settled. Certain points have been decided.

Thus, the particular words "to apply" the rents, etc., need not be employed in creating a valid express trust of the third class. It is sufficient to direct the trustee to "pay over" the rents. *Moore* v. *Hegeman*, 72 N. Y. 376 (384); *Vernon* v. *Vernon*, 53 N. Y. 351 (359); *Van Cott* v. *Prentice*, 104 N. Y. 45; *Leggett* v. *Perkins*, 2 N. Y. 297; *Marx* v. *McGlynn*, 88 N. Y. 357 (375); *Gott* v. *Cook*, 7 Pai. Ch. 521 (538–539), aff'd 24 Wend. 641; *Parks* v. *Parks*, 9 Pai. Ch. 107 (121–122), see 2 N. Y., p. 320; *Betts* v. *Betts*, 4 Abb. N. C. 317 (385). And the fact that the trustee is to *apply* during minority, and *pay over* during a subsequent period, may not indicate any distinction between the two terms. *Moore* v. *Hegeman*, 72 N. Y. 376. So with "manage and dispose of," *Cruger* v. *Cruger*, 5 Barb. R. 225; or a direction that the beneficiary "shall receive," etc. (*i.e.*, from the trustees), see *DeKay* v. *Irving*, 5 Den. 646 (651); or that the trustees "use" the income for the support of the beneficiary, *Kiah* v. *Grenier*, 56 N. Y. 220 (225); or "appropriate" the rents, for his support, *McArthur* v. *Gordon*, 126 N. Y. 597; or "manage, control, and render to the beneficiary the income," *Campbell* v. *Low*, 9 Barb. R. 585 (592–593). A trust of property "to be managed and disposed of on the separate orders and receipts of the beneficiary," is sufficient in form, if it can be read to mean the application of the rents by an active trustee, on receipts from the beneficiary. *Cruger* v. *Cruger*, 5 Barb. R. 225 (238). A devise of rents and profits to B, with gift to A of general management and disposition of the estate and income *as devised*, is sufficient. *Woodward* v. *James*, 115 N. Y. 346 (356). The direction to apply, as well as receive, may be implied. *Beekman* v. *Bonsor*, 23 N. Y. 298 (314–315). A devise of land in trust "to hold and use" for the support, etc., of A, but not to be sold or conveyed, creates a valid trust. *Kiah* v. *Grenier*, 56 N. Y. 220. On the other hand, if, as in *Harris* v. *Ely*, 25 N. Y. 138, the trust deed

conveys land in trust to suffer the grantor to occupy, possess and enjoy the property, and receive and appropriate the income to her own use, it is said that this is a passive trust, and clothes the trustee with the nominal legal title only. Also *Wainwright* v. *Low*, 132 N. Y. 313 (314, 319). In *Verdin* v. *Slocum*, 71 N. Y. 345, testator devised land in trust, and *directed* the trustees "to permit and suffer my son, William B. Slocum, to have, receive and take the rents, issues and profits thereof for the term of his natural life." The court held that "the trust attempted to be created is a passive one, and condemned by the statute. The trustees had no active duties to discharge. They were not to receive the rents and profits of lands, and apply them to the use of William B. Slocum, or to pay them over to him. They were directed to permit and suffer him to have, receive and take the rents and profits. They had no discretion to exercise. They could not refuse the permission, and they could in no way exercise any control over the rents and profits. That such a trust is condemned by the statute has never been doubted. [Citing *Parks* v. *Parks*, 9 Pai. Ch. 107, aff'd N. Y. Comm. Adv. Jan. 3, 1843; *Jarvis* v. *Babcock*, 5 Barb. R. 139; *Beekman* v. *Bonsor*, 23 N. Y. 298 (314, 316)]. William B. Slocum was entitled to the possession of the land and to the rents and profits thereof, during his life, and hence the statute (1 R. S. 727, §§ 47, 49; [Real Prop. L., §§ 72, 73]; *Craig* v. *Craig*, 3 Barb. Ch. 76) vests the legal title in him for the same term." Also *Wainwright* v. *Low*, 132 N. Y. 313 (314, 319). In *Skinner* v. *Quin*, 43 N. Y. 99 (106), however, the court say that "the trusts created by the will are all legal and valid. One was to receive the income of the estate, to pay and apply the same to the support of the testator's wife and mother during the life of the latter, and to *permit them to occupy the farm* as a home during the same period." In that case, however, the will does not in terms *direct* this to be done, but the trust is to apply the net income to the use of the wife and mother, permitting them to occupy, etc., thus, as the will was construed, leaving it to the discretion of the trustees to permit or refuse occupancy. Compare *dicta* in *Salsbury* v. *Parsons*, 36 Hun, 12. Also *House* v. *Raymond*, 3 Hun, 44 (46, 50). A beneficiary entitled to actual possession and to the rents and profits has a legal estate. *Adams* v. *Perry*, 43 N. Y. 487

(496). Where a testator directs the legal title of land to be taken in the name of the beneficiary, and gives the rents and profits thereof to a trustee to apply to the use of the beneficiary, the two provisions are inconsistent, and the title vests absolutely in the beneficiary free from the trust. *Wood* v. *Wood*, 5 Pai. Ch. 596. A conveyance, with habendum "to secure the maintenance of grantor," is not good as a trust. *Mott* v. *Richtmyer*, 57 N. Y. 49 (63–64). But compare *post*, § 757. If the beneficiary have the *right* to occupy, and collect and receive rents, the trust is void, though the trustee is required to take care that the rents are properly applied. *Jarvis* v. *Babcock*, 5 Barb. R. 139. A direction that the property "be held for the benefit and be used and expended for the support, maintenance and education of A," has been held invalid, in *Sterricker* v. *Dickinson*, 9 Barb. R. 516 (518). The true reason would seem to be that it is a trust to apply corpus only and does not give authority to receive the rents.

§ 473. **Receipt of rents—Power of revocation.**—The distinction between the cases above cited, where a trust was held void because of the reserved right of the creator thereof to occupy, or to receive the rents, etc., and the cases where a valid trust is held consistent with a reserved power in the creator thereof to re-enter, take possession, and resume control, seems to lie in the fact that in the former there is no point of time when the trustee can be said to have any title at all—his rights are at all times subordinate to the reserved rights of the grantor, who has continuing authority; while in the latter, until the power to revoke is duly and formally exercised, the trustee's title is complete; after it is revoked, the grantor comes in as a successor. The distinction may sometimes be rather shadowy. Compare *Wainwright* v. *Low*, 132 N. Y. 313 (314, 319), with *Von Hesse* v. *MacKaye*, 136 N. Y. 114. Of course a certain distinction is to be observed on this point between trusts of real and trusts of personal property. A reservation of the right to take possession, etc., which, as applied to real property, might not be capable of construction as a power of revocation, because of the formalities required in revoking such a trust, and which might therefore necessarily be understood as an illegal restriction and qualification

vitiating the attempted transfer of a modified title in trust, might nevertheless, as applied to personal property, be quite naturally construed as a mere power of revocation, and so valid, and consistent with a complete title in the trustee until exercised. See the two cases last cited. Where a trustee does allow the beneficiary to occupy, instead of receiving the rents and applying them to the beneficiary's use, there is no basis for an (intermediate) accounting of the trustee, who has received and paid out nothing. *Matter of Brewer*, 43 Hun, 597 (599). For an instance of a case where part of the trust corpus consisted of a mortgage on a farm, and the trustee, instead of collecting the interest, sent the infant beneficiaries to board at the farm for the summer, and set off the board bill against the interest, and where, accordingly, having in fact received no money from that source, he was held not liable to account as for money received, see *Dow* v. *Dow*, 18 N. Y. Supp. 222, aff'd 66 Hun, 631. But as to the trustee's right to commissions on "rents," as if received and paid out, see *Matter of Washbon*, 14 N. Y. Supp. 672 (675).

§ 474. **Trustee's discretion.**—Although a provision in the trust instrument that the beneficiary shall have the *right* to occupy the trust premises, vitiates the trust, because it is inconsistent with that full legal and equitable title, and that active right to receive the rents, which must be given to the trustee, yet in the absence of such a direction, the trustee himself may in the exercise of his discretion permit the beneficiary to occupy, and thus indirectly receive the rents. In such case he occupies and enjoys not in his own legal right, but under the legal right of the trustee. *Matter of Brewer*, 43 Hun, 597 (601). See also *Matter of Turner*, 10 Barb. R. 552 (554); *Bliss* v. *West*, 58 Hun, 71, aff'd 132 N. Y. 589; *Matter of Washbon*, 14 N. Y. Supp. 672. If the trustee permits the beneficiary to occupy, the latter must pay ordinary taxes, mortgage interest, and any other charges which would otherwise be paid by the trustee out of rents received before paying over the net balance to the beneficiary, *Bates* v. *Underhill*, 3 Redf. 365; and the trustee may repossess himself at any time, *Matter of Brewer*, 43 Hun, 597 (602), and, if necessary for this purpose, may bring an action of ejectment. *Id.*, 603. But if the beneficiary, entitled

to the income, personally buys land, though with money borrowed from the trust, and gives back to the trustee a mortgage thereon, to secure the loan, it is the mortgage, and not the land, that constitutes the trust fund, and the beneficiary has the right to occupy the land, and is the absolute owner of the equity. *Baldwin* v. *Isham*, 25 Hun, 560.

"The *cestui que trust*, if he is in a situation to know and provide for his own wants with ordinary discretion must certainly have the power to direct how the money shall be applied when it has been actually received by the trustee [*Temple* v. *Hawley*, 1 Sandf. Ch. 153 (178)] ; for it never could be tolerated, in such a case, that the trustee should have the power to direct what food the *cestui que trust* should eat, what clothes he should wear, what church he should attend and contribute to the support of, or to what other specific purpose his surplus income should be applied. In case the trustee should attempt, without any justifiable cause, to exercise such a control over the income of the trust fund, after it has been received so as to become the absolute property of the person for whose use it was to be applied, it would be the duty of this court to remove such trustee, and appoint another who better understood his duty. On the other hand it would equally be a breach of his duty to place the income, after it was received, in the hands of a lunatic or a drunkard, who he had reason to suppose would waste it without applying it to any beneficial use ; and so it would be if he purchased articles of food and clothing or other property himself, and placed them in the hands of such a person, when he had reason to believe they would be wasted, instead of being used for the benefit of such *cestui que trust* or his family. [*Mason* v. *Jones*, 2 Barb. R. 229.] In every such trust, whether the trustee is directed to pay over the rents and profits, as received, in money, or in necessaries to be purchased by himself, a certain degree of discretionary power must be vested in the trustee. And if that discretion is properly exercised by him, the rents and profits or income, received from time to time, will be applied to the use of the *cestui que trust*, whether the same are delivered to him in money or in necessaries for himself and family. Where the trustee acts in good faith, and for the apparent benefit of the *cestui que trust*, in refusing to place the rents and profits or income in

his hands to be wasted, the Court of Chancery will protect him in the honest discharge of his duty, by refusing its aid to the improvident *cestui que trust.* And if the income is paid over to the *cestui que trust* who is under no legal disability to receive it, after it has actually accrued and not by way of anticipation merely, even where the trust is in the words of the statute, he can never afterward call upon the trustee to account for the money on the ground that it has been misapplied. The statute having authorized a trust to receive the rents and profits and apply them to the use of the *cestui que trust,* if the person creating the trust thinks proper to direct the manner of the application as in this case, by paying them over to the objects of his bounty to be used in such way as they think proper notwithstanding their coverture, I cannot see why the direction is not within the letter as well as within the intent and meaning of the statutory provision on this subject. I therefore concur in opinion with those who hold that a valid trust may be created, to receive the rents and profits of real estate, and to apply them to the use of the *cestui que trust* by paying the same over to him in money, after they have accrued and been received by the trustee." *Gott* v. *Cook*, 7 Pai. Ch. 521 (538–539), aff'd 24 Wend. 641; *Van Vechten* v. *Van Veghten*, 8 Pai. Ch. 104 (126), aff'd 1 Sandf. Ch. 395; *Holden* v. *Strong*, 116 N. Y. 471; *Cornell* v. *Cornell*, 96 N. Y. 108. Where the trust is of personal property, the creator of the trust may of course give such directions, not of an illegal character, as he chooses. But the principle upon which the trustee should proceed in exercising any discretion given or left to him, as to payment and application, are the same as in a corresponding trust of realty. *Holden* v. *Strong*, 116 N. Y. 471. And where there is a trust for support, the beneficiary is entitled thereto although he may have laid by money of his own, and be able to earn his own living. *Holden* v. *Strong*, 116 N. Y. 471; also *Forman* v. *Whitney*, 2 Abb. Ct. App. Dec. 163.

While, where the rents of trust land are to be applied to the use of a beneficiary, the trustee may, if he sees fit permit him to occupy, he cannot in the absence of a direction to that effect in the trust instrument, compel the beneficiary to occupy that land, or live in any particular place, as a condition of receiving the benefit of the trust. *McArthur* v. *Gordon*, 126 N. Y. 597.

Compare *Livingston* v. *Gordon*, 84 N. Y. 136 ; s. c. 93 N. Y. 644 ; *Cornell* v. *Cornell*, 96 N. Y. 108 ; *Forman* v. *Whitney*, 2 Abb. Ct. App. Dec. 163 ; *Estate of Riley*, 4 Misc. 338 (340).

§ 475. **Where beneficiary an infant.**—If the beneficiary to whose use the rents or income are to be applied is an infant, it has been said that the proper course is for the trustee to pay them over to a duly appointed guardian, to be applied by the latter. *Bradley* v. *Amidon*, 10 Pai. Ch. 235 (243). At the least, he would in general be justified in pursuing that course. See *Furman* v. *Coe*, 1 Cai. Cas. 96 (110, 112). For the duty of determining whether to pay over, or to apply personally, exists where the question is whether the beneficiary is a proper person to trust with the expenditure of the money, while in the case of an infant beneficiary the guardian is to be presumed competent to disburse the rents paid over to him. See *Bradley* v. *Amidon*, 10 Pai. Ch. 235 (243) ; *Oakley* v. *Oakley*, 3 Dem. 140. But it is suggested that this presumption may not be conclusive in favor of the trustee, and that he should not thus pay over the rents if he knows that the guardian is not making a proper application of them, but should, in pursuance of his general duty under the trust, bring the matter to the attention of the court. The guardian's right and duty to see that the trustee is properly managing the corpus, *Robert* v. *Morgan*, 4 Dem. 148, may have its correlative duty on the part of the trustee to see that the income is properly applied by the guardian, at least if he has reason to suspect bad judgment or bad faith. If there is no general guardian, the rents or income should be applied personally by the trustee until one is appointed to receive them from the trustee and apply them. But even after such appointment, it would appear that the trustee would be justified in directly applying proper sums for proper purposes, from the rents. *Savage* v. *Olmstead*, 2 Redf. 478 (480). See *Hyland* v. *Baxter*, 42 Hun, 9. Where rents are paid over, instead of "applied," the necessity of paying them to a guardian does not appear entirely settled. In *Ireland* v. *Ireland*, 84 N. Y. 321 (326), the court, in discussing a point not before them, appear to suggest that a trustee may directly apply rents to the use of infant beneficiaries, or may pay them over to their father as the head of the family, if

not an improper person (see *Matter of Slocum*, Tucker, 443), while in *Savage* v. *Olmstead*, 2 Redf. 478 (480), it is held that a payment to the natural guardian would be unauthorized; see also *Hoyt* v. *Hilton*, 2 Edw. Ch. 202; 2 Perry on Trusts, § 624; *Matter of Hobson*, 61 Hun, 504, aff'd 131 N. Y. 575.

§ 476. **Application of distinct shares.**—A provision for receiving and paying over income to several beneficiaries during one life, does not necessarily imply that if one dies during the term the others are to receive his share of income. In the absence of any direction, and under certain circumstances, that share of income may be regarded as undisposed of by the trust instrument, and may be dealt with accordingly, *Delafield* v. *Shipman*, 103 N. Y. 463 (469); *Strang* v. *Strang*, 4 Redf. 376; under principles stated *post*, §§ 477, 489, 491, 556.

§ 477. **To apply part only.**—A trust to apply a part of the entire rents gives title to the trustee in all the land. *Cochrane* v. *Schell*, 140 N. Y. 516 (537). If the other part is undisposed of by the trust instrument, the law disposes of it by giving it, if it accrues during a term of suspension occasioned by an expectant estate, to those presumptively entitled to the next eventual estate (*post*, § 489), and otherwise to those entitled under the principles of the common law (*post*, § 556). And if only so much is undisposed of as is not needed from time to time for the beneficiary of the trust, the surplus thus disposed of by law may fluctuate accordingly from time to time. *Kilpatrick* v. *Johnson*, 15 N. Y. 322 (329). *Post*, § 491. And the rights of a beneficiary, on the other hand, may be dependent on those of some other person (who may even be the trustee), who is also entitled to income for his support. *Macomber* v. *Bank of Batavia*, 12 Hun, 294. Thus, a trust to apply the total rents to the use of A for his life, except the application of certain specified annual sums to the use of B, is in legal effect a trust providing first for B, and then for A so far as the remaining rents will permit. *Matter of Chauncey*, 119 N. Y. 77; *Delaney* v. *Van Aulen*, 84 N. Y. 16. See *post*, § 488.

§ 478. **Trust for support—Fixing amount.**—Where a will creates a trust to pay over so much of the income or principal as

may be necessary and proper for the support of the beneficiaries, the question whether the trustees are authorized to fix the amount thus necessary, or whether it shall be fixed by the court, depends on the intention of the testator, as expressed in the will. If the amount to be applied to the use of a beneficiary is made to depend on his actual needs, or any other test as to which different views might be entertained, and no discretion is given to the trustee, or any other person, the appropriate amount is determined by the court. *Bundy* v. *Bundy*, 38 N. Y. 410; *Estate of Riley*, 4 Misc. 338 (342). Compare *Bradley* v. *Amidon*, 10 Pai. Ch. 235 (243). *Post*, § 480.

§ 479. **Increase and decrease.**—Power in the trustee to increase the amount of income payable to a beneficiary, does not authorize a subsequent decrease to the original amount, *Mason* v. *Jones*, 13 Barb. R. 461, aff'g *Mason* v. *Mason's Ex'rs*, 4 Sandf. Ch. 623 (630), but would seem to warrant successive increase. 13 Barb., R. p. 465. But if the other trust purposes are completed, and a corresponding portion of the estate is duly distributed, reserving a specific fund to supply the income of the trust in question, this constitutes a final determination to effect no further increase except in so far as the income of the specific reserved fund may permit. *Case* v. *Towle*, 2 Sandf. Ch. 426.

§ 480. **Discretion—By whom exercised.**—Where discretionary power is given to trustees to withhold, increase or decrease payments, or do other acts, the trust instrument often indicates whether the trustees must all unite in exercising it, or whether it may be exercised by a majority, or by certain trustees. In the absence of such indication, the general rule applies that in so far as the discretion is to be exercised by the trustees at all, all must agree and unite. 1 Perry on Trusts, § 413. But the terms which appear to confer a discretion may, as a matter of construction, constitute a direction to perform given acts if certain facts actually exist, in which case the court may determine the existence of the facts and compel the performance of the resulting duty. *Ante*, § 478; *post*, §§ 488, 581–584. Discretion may be given to the trustee to apportion the rents among several beneficiaries as he deems wise. If he

acts improperly or inequitably, equity will intervene, and control his discretion, but not if he keeps within the bounds of a fair and reasonable discretion, except on special grounds calling for relief. For illustration of such special grounds, and also of the main principle just stated, see *Ireland* v. *Ireland*, 84 N. Y. 321. As to abuse of such discretion, see *Jones* v. *Jones*, 8 Misc. 660.

§ 481. **Application by way of offset.**—If the trustees loan trust funds, as they may do, to the beneficiary, on bond and mortgage on real estate, they may "apply" the income represented by that fund by crediting the mortgagor therewith as a payment of interest on the mortgage, and endorsing it as such on the bond, at least if the beneficiary consent to such a course; and it would appear that the offset could in substance be effected irrespective of such consent. *Baldwin* v. *Isham*, 25 Hun, 560; *Judge* v. *O'Connor*, 70 Hun, 384. See also end of § 474.

§ 482. **Making up deficiency.**—Where there is a trust to apply rents and income, *simpliciter*, of course the beneficiary simply receives, in each year, whatever there may be, whether more or less. *Delaney* v. *Van Aulen*, 84 N. Y. 16 (23). Obviously the same rule must govern where a given proportion of the rents or income is to be applied. But the trust instrument may fix a precise sum to be applied or paid from the rents or income, or furnish some rule according to which the amount is to be fixed from time to time (*e.g.*, to apply $500 a year from the rents; or to pay over to the beneficiary such annual sum as the trustees shall determine to be appropriate for his education and maintenance). If, in such a case, the rents and income in a given year fall short of the sum fixed, two questions arise: First, whether the deficiency may be made up from corpus; second, whether it may be made up from surplus avails in after years. See also, as to a provision for a separate fund to made up deficiencies, *post*, § 485.

§ 483. **(a) From corpus.**—In *Delaney* v. *Van Aulen*, 84 N. Y. 16, testatrix left her property in trust to receive and pay the rents and income to A for life, *except* a specified annual sum to be paid therefrom to B for life. The question involved was whether,

the rents proving insufficient to supply this latter provision, the deficiency could be made up from corpus. The court trace the history of the question whether a direction to take rents and profits, and thereout to pay a sum of money, confines the source of payment to the rents and profits as they come to hand from year to year, or permits encroachment on the principal, by sale or mortgage. They find that the natural meaning of the words had, by 1813, been extended, by force of a well-established rule of chancery, to cover a power to supply a deficiency by sale or mortgage, when the will requires (1) the raising of a gross sum at a fixed time when it must be raised and paid without delay, and (2) when the direction is not restrained by other words. But they also find that while this rule would apply to annuities, yet now the operation of the rule may be restrained not only by the words of the will, but by all other indications which courts are wont to note in order to gather the intention of a maker of a disposing instrument in writing. "The courts have been ready to take hold of the context of wills to hold the rule in check." "Indeed, it may now be said that there is no principle whatever involved in these cases, save to ascertain what is the testator's intention and to carry that intention into effect." In the case last cited, the court rely heavily on the fact that the primary gift is of the rents and income, *except* the annual sum provided for the subsidiary beneficiary. Obviously the primary gift called for income only, and not for capital in any event. The other gift being a mere exception therefrom must be construed in the same way. Extrinsic evidence was also relied on. Compare *Pierrepont* v. *Edwards*, 25 N. Y. 128 (138); *Florence* v. *Sands*, 4 Redf. 206. Also as to whether a direction to invest a sum sufficient to net $1000, and pay it yearly to A, is restricted to the particular fund, see *Matter of Haviland*, 49 Hun, 301, aff'd 124 N. Y. 640. The testator may of course specifically provide that any deficiency shall be made up from some other source, as, from the corpus, or from other funds in the hands of the trustee, as in *Matter of Hayden*, 77 Hun, 219. *Post*, § 485.

§ 484. **(b) From future surplus.**—In *Matter of Chauncey*, 119 N. Y. 77, this question came before the court on the same will considered in *Delaney* v. *Van Aulen*, *ante*, § 483. A, who

had been entitled for life to all the income except the specified annual provision for B, had died. The court found that the *intent* was to supply any deficiency in the payments to B, after A's death, from surplus income of succeeding years ; but they appear to lean strongly toward the conclusion that such intent would have been presumed in the absence of any particular indication of intent, or at any rate that the fact that the provision is for *support*, furnishes sufficient indication. To the same effect are *Stewart* v. *Chambers*, 2 Sandf. Ch. 382 ; *Cochrane* v. *Walker*, 4 Dem. 164 ; *Matter of Roos*, 4 Misc. 232 (234). The questions already discussed are not necessarily confined to cases where surplus receipts are not specifically disposed of by the will. *Stewart* v. *Chambers*, 2 Sandf. Ch. 382 ; *Matter of Chauncey*, 119 N. Y. 77 (84). For whether there is or is not a disposition of surplus, any real surplus, after satisfying the annuities in the sense intended, belongs to somebody, either under the will or under the controlling law. The real question is, what constitutes surplus over and above what is needed for a complete fulfilment of the terms of the provision in question. Where there is a trust to receive and apply rents, and to sell the land, and to add to its proceeds from the residuary estate enough to make up a total sum specified, to be held on the same trust, the beneficiaries, until the land is sold, are entitled only to the rents of the land, and cannot have any supposed deficiency in what would have been earned by the sum named, if it had been raised and set off, made up to them. *Fincke* v. *Fincke*, 53 N. Y. 528. But when the sale takes place, and the amount required from the residuary estate, to make up the specified fund, is ascertained, then the beneficiaries become entitled to a further sum, representing interest on such amount, computed from the testator's death. *Rodman* v. *Fincke*, 68 N. Y. 239.

§ 485. **Fund to supply deficiencies.**—The creator of the trust may establish a fund to make good any falling off of income on the corpus of the trust. *Matter of Thompson*, 1 Con. 145 ; *Rodman* v. *Fincke*, 68 N. Y. 239. *Ante*, end of § 483. But apart from any such provision, it appears that if any surplus of rents remains in any year, after full satisfaction of the required payments of the current and preceding years, it cannot be held

as a fund to meet future deficiencies, but must be distributed to those then entitled to it. *Matter of Chauncey*, 119 N. Y. 77 (85). See *Matter of Roos*, 4 Misc. 232 (234). As to whether a direction to reserve such surplus, in order to make good any future deficiency, would constitute an "accumulation" under the Statute of Trusts, see *Grant* v. *Grant*, 3 Redf. 283.

§ 486. **Payable out of the State.**—In *Stewart* v. *Chambers*, 2 Sandf. Ch. 382 (399–400), the trust instrument provided for the payment of income in London, in British sterling money. It was held that the prayer of the trustees asking for directions must be answered by directing the purchase of exchange on London, the beneficiary being there. See also Conflict of Laws, Chap. XXIX.

§ 487. **Illegal or impossible condition.**—If income is to be applied to the use of a beneficiary, but the provision is subject to an illegal or impossible condition, the general principles applicable to beneficial legacies or devises would appear to be applicable. *Potter* v. *McAlpine*, 3 Dem. 108 (123 *et seq.*); *Hogan* v. *Curtin*, 88 N. Y. 162. A thorough and clear review and discussion of the history of the law affecting conditions in restraint of marriage, is to be found in Bigelow's note to the 13th ed. of 1 Story, Eq. Jur., p. 276, note *a*. As to the general law of conditions, precedent and subsequent, and their effect on the validity of testamentary dispositions, see 2 Williams on Executors (Randolph & T.'s Ed.), 570 *et seq.* and notes; *Id.*, 585 *et seq.* and notes. *Id.* (Perkins Ed.), Vol. II., p. 1357 *et seq.* *O'Brien* v. *Barkley*, 60 State Rep. 520; *Horndorf* v. *Horndorf*, 13 Misc. 343; *Simonson* v. *Waller*, 14 Misc. 95; *Matter of Bratt*, 10 Misc. 491.

§ 488. **To apply corpus.**—In real property there cannot be a valid express trust to turn over the corpus to the beneficiary (*ante*, § 394), though there may be a power to convey to the beneficiary, or to sell and pay over a part or all of the proceeds (*post*, § 617), and this power may in general co-exist with an express trust for any valid purpose (*post*, § 618). But in personal property, there being practically no restriction on the purposes for

which an express trust may be created (*ante*, § 414), there may be a trust to hold and pay over principal as well as income. Such a trust, or a power for a like purpose, does not interfere with the vesting of a gift of the remainder, or the surplus of the proceeds of sale, in so far as not thus consumed. *Mitchell* v. *Knapp*, 54 Hun, 500 (505), aff'd 124 N. Y. 654. *Sauter* v. *Muller*, 4 Dem. 389 ; *ante*, § 161 ; *Terry* v. *Wiggins*, 47 N. Y. 512 ; *Campbell* v. *Beaumont*, 91 N. Y. 464. But in such cases, only imperious necessity should be allowed to override the apparent contemplation of testator, that there would probably be something left for the gift over to act on. *Roosevelt* v. *Roosevelt*, 6 Hun, 31 (42), aff'd "substantially upon the opinion below," 64 N. Y. 651. As to the power of the court to compel a trustee to exercise a discretionary power to pay over corpus, see *Matter of Berry*, 5 Dem. 458 ; *Matter of Blanck*, 5 Dem. 301 ; *Banning* v. *Gunn*, 4 Dem. 337. *Ante*, § 480 ; *post*, § 584 *et seq.* In the absence of authority in the trust instrument, the trustee is not authorized to apply corpus to the use of the beneficiary. *Smith* v. *Smith*, 3 Dem. 556. The corpus does not belong to the beneficiary as such, and he has no rights in it, except as a breeder of rents or income. Therefore even the Supreme Court, which has inherent power in extreme cases to control the corpus of personalty, or the rents of realty, for the use of its owners if infants or otherwise incompetent, *Matter of Muller*, 29 Hun, 418 ; *Hyland* v. *Baxter*, 42 Hun, 9 (13) ; *In re Bostwick*, 4 Johns. Ch. 100 ; *Losey* v. *Stanley*, 147 N. Y. 560 (570), has no power, nor can the Legislature give it any power to apply to the use of any beneficiary, property which belongs to somebody else. *Lockwood* v. *Lockwood*, 3 Redf. 330 (337) ; *Losey* v. *Stanley*, 147 N. Y. 560. If the corpus itself belongs, subject to the trust, to the same person who is the beneficiary of the trust, then, if it is personal property, the court may, in case of necessity, order such application, if the beneficiary is incompetent, acting under its inherent powers ; if it is real property, and the beneficiary is incompetent, then the Legislature may authorize the court to act. *Id.* *Powers* v. *Bergen*, 6 N. Y. 358. Compare, as to apportionment of payments, as between the trust estate and the remainder, *ante*, § 437 *et seq.* And in such cases, where the trust fund is personal, and the facts are such that the court, if

applied to, would have authorized an application of corpus, by the same person who is trustee, to the support of infant remaindermen, the court may, on settling the trustee's account, credit him with proper applications of corpus thus made, though he had acted voluntarily and had not applied to the court for permission ; and so, even though he had, according to his own theory, paid from corpus, expenses that should have been paid from income, where the beneficiary, who thus received an undue excess of income, employed the same for the necessary support of the infant remainderman. The net result is the same as if the trustee had paid the expenses from income, and applied a like portion of the corpus to the support of the infant remaindermen directly. *Matter of Braunsdorf*, 2 App. Div. 73. So where there is no trust at all—for example, where an incompetent person is entitled, as a legatee, to the income of a fund for life—the court may allow depletion, if necessary, and if the person entitled in remainder consents. *Matter of Muller*, 29 Hun, 418 ; *Hyland* v. *Baxter*, 42 Hun, 9. So where, pending probate, one may receive an allowance, if entitled whether the will stand or fall. *Rice* v. *Tonnele*, 4 Sandf. Ch. 568 ; *Hoyt* v. *Jackson*, 1 Dem. 553. As to allowance to a trustee, on accounting, of advances improperly made by him from corpus, on the theory of a charge against future income, see *Matter of Rutherford*, 5 Dem. 499 ; *Saltus* v. *Saltus*, 2 Lans. 9 ; *Matter of Saltus*, 3 Abb. Ct. App. Dec. 243 (246) ; *Matter of Odell*, 1 Con. 91. The trust instrument may even empower the trustee to apply corpus to his own use. *Jones* v. *Newell*, 78 Hun, 660.

§ 489. **Rents undisposed of.**—" When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate." Real Prop. L., § 53.[1] Under this statute there are three points to be considered : (*a*) When are rents

[1] This statute is applied, by analogy, to personal property. See *post*, § 765 (*c*).

"undisposed of"? (*b*) When does this statute apply? (*c*) What is the "next eventual estate"?

§ 490. (a) Meaning of "undisposed of." [1]—Rents may be undisposed of, in the sense of this statute, either because there is no attempt to dispose of them, or because there is an attempted disposition which is void. (Cases cited *post*, § 491.) A further distinction of importance is illustrated by two recent cases. In *Cochrane* v. *Schell*, 140 N. Y. 516, a trust was created to receive and apply rents and income to the payment of certain annuities amounting to $20,000. The actual income was $80,000, and no other disposition thereof was made. The court held that there was an implied trust for accumulation of the rents over and above $20,000, which was void, as not being for minors; and as there was a future estate which caused a suspension, and the surplus was "undisposed of," it passed to those presumptively entitled to the next eventual estate. In *Hendricks* v. *Hendricks*, 3 App. Div. 604, testatrix created a trust to receive and apply all the income to the use of a lunatic daughter. The actual income was largely in excess of her needs. The court held that as the trust required the application of all of it to the use of the beneficiary, none of it was "undisposed of," and the surplus not needed vested, as it accrued, in the beneficiary. In other words, if the creator of the trust chooses, he may validly direct the application of the rents, however large, to the use of a beneficiary, however small his capacity of utilizing them as they accrue; and they are not "undisposed of" because they exceed the beneficiary's needs. To the same effect is *Gasquet* v. *Pollock*, 1 App. Div. 512, where the direction of the will was to pay the surplus not needed for the support of the lunatic beneficiary, to his committee. Compare *ante*, § 477. So with an infant, if the surplus rents vest, but payment is merely postponed during infancy, *Horton* v. *Cantwell*, 108 N. Y. 255 (265).

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[1] Although not specifically disposed of, rents or income may be covered by a general residuary clause, see *Matter of Crossman*, 113 N. Y. 503. The result of such a clause is, that the rents are not undisposed of, and therefore this statute does not apply. *Matter of Dey Ermand*, 24 Hun, 1 (15). See *post*, § 523.

§ 491. (b) **When statute applies.**—After it is determined in a given case that there are "rents undisposed of," still the statute only applies to cases involving both of the following features —that is: (1) where there is a "suspension," which (2) exists "*in consequence* of a valid limitation of an expectant estate;"[1] *e.g.*, where there is a remainder either contingent because persons who may take it cannot be ascertained, or vested defeasibly subject to being defeated wholly or partly, during the pendency of the preceding estate, in favor of persons who, in the meantime, cannot be definitely ascertained. *Cochrane* v. *Schell*, 140 N. Y. 516 (538-539); *Matter of Crossman*, 113 N. Y. 503. Where rents are undisposed of, but there is no suspension, or, if there is a suspension, it does not exist in consequence of an expectant estate, then this statute does not apply, and the disposition which the law makes of the rents is determined by other principles (see *ante*, § 477, and *post*, § 556). The next thing to be done, therefore, is to determine when a suspension is, and when it is not, occasioned by an expectant estate. It is very clear that it is thus occasioned where a future estate is given to persons who cannot be ascertained till a future period, so that in the meantime there are no persons in being who could convey an absolute fee (*ante*, § 383; *Cochrane* v. *Schell*, 140 N. Y. 516, 538-539). If, in such a case, the rents are undisposed of, the statute applies, without dispute. Nearly all the cases dealing with this general subject are of this class: *Delafield* v. *Shipman*, 103 N. Y. 463; *Cochrane* v. *Schell*, 140 N. Y. 516 (538-539); *Cook* v. *Lowry*, 95 N. Y. 103; *Pray* v. *Hegeman*, 92 N. Y. 508 (s. c. 98 N. Y. 351, see 72 N. Y. 376); *Schettler* v. *Smith*, 41 N. Y. 328; *Barbour* v. *De Forest*, 95 N. Y. 13; *Kilpatrick* v. *Johnson*, 15 N. Y. 322; *Matter of Crossman*, 113 N. Y. 503 (510-511); *Hull* v. *Hull*, 24 N. Y. 647; *Gilman* v. *Reddington*, 24 N. Y. 9; *Cushman* v. *Horton*, 59 N. Y. 149; *Matter of Sands*, 1 Con. 259; *Craig* v. *Craig*, 3 Barb. Ch. 76 (79, 93); *Haxtun* v. *Corse*, 2 Barb. Ch. 506 (518); *Gott* v. *Cook*, 7 Pai. Ch. 521 (541), aff'd

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[1] The statute also applies only to cases where the income in question is derived from some specific fund, or from property so situated that its rents or income can be readily distinguished from that of all other property. *Phelps's Ex'r* v. *Pond*, 23 N. Y. 69 (83).

24 Wend. 641 ; *Grant* v. *Grant*, 3 Redf. 283 ; *Van Emburgh* v. *Ackerman*, 3 Redf. 499. So also where there is an expectant estate which is *vested*, but vested in trustees on such a trust that the trustee cannot sell and the beneficiary cannot release (*ante*, § 383), it is equally clear that if the rents in the meantime are undisposed of, the statute applies. Thus in *Manice* v. *Manice*, 43 N. Y. 303 (385), there was first an estate in trust for one life, to apply part of the income, and next a trust in the remainder, for another life, to apply all the income, and it was held that the rents undisposed of under the first trust were payable to the trustees of the second trust for the beneficiary thereof. So wherever there is a power, to be exercised only in future, in favor of unascertained persons or of trustees, so that the future estate or interest to arise under the exercise of the power cannot in the meantime be released, here, if there are intermediate rents undisposed of, the statute would apply. For in all the foregoing cases, there is a suspension *occasioned* by an *expectant estate*. But there is another class of cases where there is a *present* vested estate in trustees, to receive and apply or accumulate part of the rents, the other part being undisposed of, and a vested remainder is limited upon the precedent trust estate. It has been supposed, that in such a case the resulting suspension was due solely to the fact that though the estate was present and vested, it was vested in trustees forbidden to convey, and for the benefit of persons forbidden to release their rights, and that such *a present estate* had nothing about it answering to the term *expectant*, see *ante*, § 383 *et seq.* ; while the expectant estate, *i.e.*, the remainder, being absolutely vested, cannot possibly be the cause of the suspension.

Nevertheless, the point has been raised, that as, under such a trust, the rents and profits, or income, are to accrue through a period extending into the future, and as the right of the beneficiary to them is to attach from time to time as they accrue and fall due, the beneficiary has, in a sense, an expectant estate in the rents and profits, which, under the statutes forbidding sale or release, occasion a suspension ; and that if some part of the rents are undisposed of, the statute above quoted applies, and gives them to those entitled to the next eventual estate. *Matter of Roos*, 4 Misc. 232 ; *Gould* v. *Rutherfurd*, 6 Misc. 72, aff'd

79 Hun, 280 ; see *Matter of Hayden*, 77 Hun, 219, and *Robison* v. *Robison*, 5 Lans. 165. This view would appear to be based on the statute providing that " a disposition of the *rents and profits* of real property to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in this article [on Creation and Division of Estates] for *future estates* in real property." Real Prop. L., § 50. This view was urged upon the Court of Appeals in *Cochrane* v. *Schell*, 140 N. Y. 516 (538–539), and was dismissed as involving an unnatural construction. But it so happened that in that case there was also a future estate in the corpus which did occasion suspension, and so brought the case within the statute.

The point might be dismissed without serious attention but for the fact that in the new revision the whole scheme of suspension now appears to be, and as a matter of grammatical construction certainly is, hinged on the theory that a suspension can be occasioned solely by a future estate (*ante*, §§ 383–386), from which it follows either that § 50 just quoted does render the beneficial interest under a trust to receive and apply or accumulate rents a future estate, or that present trusts of that class do not occasion suspension at all (*ante*, §§ 383–386). It is hardly to be supposed that the latter alternative will be adopted by the courts. It is to be noticed, however, that if the other is correct, the statute relating to rents undisposed of, Real Prop. L., § 53 ; *ante*, § 489, is unfortunately worded. It says : " When, *in consequence* of a valid limitation of an *expectant estate*, there is a suspension," etc., thus implying that there may be a suspension not thus occasioned ; while the theory under consideration necessitates the view that every suspension must be thus occasioned. To fit the theory, this section should read : " *Whenever* there is a suspension," etc.[1]

[1] It may be noticed that in their Notes the revisers of 1830, in referring to the provision now embodied in Real Prop. L., § 53, relating to rents undisposed of, say : " This section is adopted substantially from the work of Mr. Humphreys, to which we have before referred. His reasons for it are thus given : ' A distinction refined, but substantial, subsists under our law, between estates vested, but defeasable—as a limitation to the first son of A, but if he shall die under the age of twenty-one, then to his second son—and a con-

It should here be noticed that in several *dicta*, and one decision, the Court of Appeals have applied the statute under consideration to cases where there was a present trust estate followed by an absolute and indefeasibly vested remainder. This one decision is sweeping in its terms. "We think it [this statute] is applicable to all cases where trusts are created and there is an expectant estate."[1] But as to this case, it is to be noticed (*a*) that the court expressly state that the result in the case in hand would be precisely the same, irrespective of any reliance on this statute, both under the expressed provisions of the will and also under the rules of the common law; therefore the construction given to the statute was unnecessary; (*b*) that this case, decided twenty years ago, has never since been cited by the same court upon this point; and (*c*) that its doctrine is practically overruled by *Cochrane* v. *Schell*, 140 N. Y. 516 (538–539), where the court intimate that the statute does not apply if there is a present trust estate followed by an indefeasibly vested remainder, but only where the suspension exists *in consequence* of the limitation of a *future* estate which ties up the property. The *Embury case* entirely overlooks the statutory term "*in consequence* of a valid limitation of an *expectant* estate," while the *Cochrane case* calls attention to this essential feature, the court saying (pp. 538–539): "It is claimed that if the grandchildren took vested remainders,

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tingent estate, as a limitation to such a son of A, as shall first or alone attain the age of twenty-one. In the latter case, nothing vests, and consequently the rents are undisposed of, and belong as such to the donor and his heirs, in the interim; yet there is no doubt but the donor, were this distinction explained to him, would in the latter case, as well as in the former, give the accruing rents to the infant donee.' (Humphreys on Real Property, p. 260.) A still stronger reason for adopting the section, is furnished by § 35 of this Article [Real Prop. L., § 48], which prevents a future estate from being defeated by the determination of the precedent estate before the happening of the contingency, on which the remainder is limited. If that section be adopted and the present omitted, the rents and profits during the interval between the determination of the prior, and the vesting of the contingent estate, would go to the heirs, contrary to the very plain intention of the person creating the estate. As the law now is, the rents, etc., may be, and generally are, preserved to the remainderman, by the intervention of trustees. But to dispense with the necessity of creating such trustees, is one of the benefits we propose to attain."

[1] *Embury* v. *Sheldon*, 68 N. Y. 227.

then the statute does not apply, for the reason that the limitation of a vested expectant estate does not suspend the power of alienation, and that it is only where the power of alienation is suspended by a contingent limitation of a future estate that § 40 [Real Prop. L.,§ 53] applies. In other words, that the present estate in the trustees, although the power of alienation is suspended thereby, by force of §§ 63 and 65 of the Statute of Uses and Trusts [Real Prop. L., §§ 83, 85] does not create the suspension which brings the case within § 40 [Real Prop. L., § 53], because that only applies where the suspension is 'in consequence of a valid limitation of an expectant estate.' This construction of the statute seemed to be the natural construction according to the ordinary meaning of the language. It seems to have been assumed by the revisers and the Legislature that if the future estate was vested and absolute, the surplus income would, without any statutory rule, go to the persons in whom the estate was ultimately to vest in possession. (See *Gott* v. *Cook*, 7 Pai. Ch. 521 [aff'd 24 Wend. 641].)"

§ 492. (c) **Next eventual estate.**—The persons presumptively entitled to "the next eventual estate" may, or may not, be the same persons to whom the "expectant estate" is limited. Thus:

(1) If the suspension is occasioned by an expectant *vested* estate, given to trustees upon a trust which effects suspension, these trustees, as such, are also the persons presumptively entitled to the next eventual estate. *Manice* v. *Manice*, 43 N. Y. 303 (385); compare subd. 7, *post*.

(2) If the suspension is occasioned by an expectant estate *vested* in ascertained persons, subject to being divested, wholly or partly, in favor of unascertained persons, the persons in whom the expectant estate is defeasibly vested, are also the persons presumptively entitled to the next eventual estate. *Cochrane* v. *Schell*, 140 N. Y. 516 (539–540); *Matter of Crossman*, 113 N. Y. 503; *Cook* v. *Lowry*, 95 N. Y. 103 (108); *Matter of Hoyt*, 11 N. Y. Supp. 901, see *Matter of Hoyt*, 71 Hun, 13 (17).

(3) If the suspension is occasioned by a *contingent* expectant estate given to the person or class who shall, at a future period, answer to a given description, and there are in the meantime per-

sons answering to that description, they are, for the time being, the persons presumptively entitled to the next eventual estate. *Delafield* v. *Shipman*, 103 N. Y. 463 ; *Kilpatrick* v. *Johnson*, 15 N. Y. 322. This class and the preceding differ only in this : that in the former, the estate is vested with the possibility of being defeated through the appearance of the unascertained persons ; while in the latter, the estate is contingent, with the possibility of becoming absolute through the non-appearance of the unascertained persons.

(4) If in a case like the last, there are for the time being no persons answering the required description, but there is also an alternative limitation over to others, who are ascertained, in default of the taking effect of the first limitation, then those who are thus ascertained are in the meantime presumptively entitled to the next eventual estate. *Grant* v. *Grant*, 3 Redf. 283 (289). The decision in *Barbour* v. *DeForest*, 95 N. Y. 13, is *contra*, but the point does not seem to have been raised.

(5) If, however, the suspension is occasioned by an expectant estate limited solely to persons or a class of a description to which no one answers at all, so that there are no persons in being who will presumptively take under the limitations of the will, then it would appear that those persons in being who will take the future estate by operation of law, under an intestacy, in case the contingent disposition does not take effect, are entitled for the time being to the rents undisposed of.

(6) And if there is both a trust, ranging over the whole estate, but covering, during its entire term, an application of only a part of the rents, and also an expectant estate which occasions suspension, so that suspension results from a double cause, it is the persons presumptively entitled to the expectant estate (under some one of the foregoing subdivisions), and not those entitled under the present trust, as such, to whom the statute gives the rents undisposed of. *Cochrane* v. *Schell*, 140 N. Y. 516 (539–540). The fact that the expectant estate is only a life estate is immaterial. *Manice* v. *Manice*, 43 N. Y. 303 (385). The case of *Gould* v. *Rutherfurd*, 6 Misc 72, aff'd 79 Hun, 280, is inconsistent with its own theory. There there was a trust ranging over the whole estate, to receive the rents and apply half of them, for one life, followed by an absolute vested remainder. The court

held that the present trust estate was an "expectant estate" that occasioned suspension, but that nevertheless the vested remainder was the "next eventual estate," and that those in whom it was vested were entitled to the rents undisposed of.

(7) If there is a suspension occasioned by a future estate, and, under a present trust ranging over the entire estate, a part of the rents are, during a portion of the trust term, undisposed of; but for a succeeding period, and during the rest of the same trust term, these same rents are disposed of, it has been held that the equitable estate, so called, in the person who is in future to receive those rents during the second portion of the trust term, is the "next eventual estate," and that he is, therefore, entitled to receive the rents undisposed of during the first portion of the trust term. *Pray* v. *Hegeman*, 92 N. Y. 508; *Barbour* v. *DeForest*, 95 N. Y. 13; *Schettler* v. *Smith*, 41 N. Y. 328 (339). With these cases compare *Manice* v. *Manice* (*ante*, this section, subd. 1), where the trustee of the future trust was held to be the person presumptively entitled (in trust) to the next eventual estate. See also *ante*, first paragraph of § 491.

§ 493. **To apply incidental rents.**—A trust to sell land at retail, and pending sale to rent, and to pay over to the grantor during life all moneys received, includes the meaning to pay over the *rents*. *Fellows* v. *Heermans*, 4 Lans. 230 (235). Such a provision would not be valid as an express trust under the first or second class, on account of its purpose; nor under the third class unless the receipt and application of the rents was the chief purpose and not merely incidental. Compare *Heermans* v. *Robertson*, 64 N. Y. 332; but it would be valid as a power in trust. *Post*, §§ 617, 618.

§ 494. **Deduction of debts.**—Testator, in giving, may of course give more or less as he chooses. He may, for example, in creating a trust, diminish a beneficiary's interest by directing a deduction of debts actually owing by him to testator, and may refer to his books for an itemized statement thereof. See *Robert* v. *Corning*, 89 N. Y. 225 (241–242); *Lawrence* v. *Lindsay*, 68 N. Y. 108. As to debts of the beneficiary to testator, or to the trust estate, where there is no provision in the will authorizing deduction, see *Rudd* v. *Rudd*, 4 Dem. 335; *Smith* v. *Murray*, 1 Dem. 34; *Stamler's Estate*, Tucker, 42.

CHAPTER IX.

TRANSFER OF BENEFICIAL INTERESTS.

§ 495. **Introductory.**—The test of the trustee's right or power to assign or otherwise dispose of trust property is found in the sections of the Real Property Law, §§ 84, 85, rendering void all sales, conveyances or other acts of the trustee *in contravention of the trust*, if the trust is expressed in the instrument creating the estate ; but rendering the conveyance to the trustee absolute as to subsequent creditors of the trustee without notice, and subsequent purchasers from the trustee without notice and for value, if the trust is not contained or declared in the conveyance to the trustee. These provisions apply to the four classes of express trusts. As to transfers by the beneficiary of his rights, however, there is a distinction between two groups into which these trusts fall. Under some, the beneficiary may transfer his rights, pending the trust ; and under others, he may not. In a general way, the test is to some extent the same as in the case of the trustee, namely, that the beneficiary may not transfer his rights if such an act would be *in contravention of the scheme of the trust.* Obviously there are certain trusts where there would be no object in prohibiting a transfer of the beneficiary's right to enforce the trust ; and there are others where a transfer of that right would utterly frustrate the whole purpose of the trust. To the former class belongs, for example, a trust to sell real property for the benefit of creditors ; there is no reason why the creditor should not transfer his claim, and thus substitute the transferee in his place as beneficiary. To the other class belongs, for example, a trust to receive rents and profits and apply them to the use of a person incompetent to manage his own affairs wisely ; here the very object is to protect him against himself, and prevent him from dissipating his interest under the influence of folly, ignorance or improper influence. Apart from such cases

where the distinction is plain, there are, however, some where it is very difficult to determine whether the true purpose of the trust forbids or permits a transfer of beneficial interests. The revisers of 1830 attempted to formulate a statutory test, which has not, however, proved clear or satisfactory. The revisers of 1896 have endeavored to remove the difficulty, but their success, it is feared, will not prove substantial. The two tests thus provided will now be considered.

(1) *Under the Revised Statutes.*

§ 496. The statute.—[1] "No person beneficially interested in a trust for the *receipt of the rents and profits* of lands can assign or in any manner dispose of such interest, but [2] the rights and interest of every person for whose benefit a trust *for the payment of a sum in gross* is created, are assignable." 1 R. S. 730, § 63.[1]

(*a*) *Non-assignable Interests.*

§ 497. Purpose of prohibition.—The general purpose of the first clause of the statute, nullifying any attempted disposition of his interest by a person beneficially interested in a trust for the receipt of the rents and profits of lands, was, of course, to furnish a method by which owners of property might make sure provision for the future maintenance, education and care of those dependent on them. Infants, married women, persons of unsound mind, spendthrifts, those inexperienced in business affairs —all such could be fully protected from others and from themselves, only by rendering their interest inalienable. The Revised Statutes did not, it is true, confine the provision to the case of persons incompetent to manage their own affairs, *Cochrane* v. *Schell*, 140 N. Y. 516 (533), but it was for their benefit that these indestructible trusts were chiefly intended; and the provision against assignment has been strictly construed, and is applicable to all trusts of the class included, irrespective of the actual capacity of the beneficiaries in a given case. *Radley* v.

[1] The power of a beneficiary in a trust created before the Revised Statutes were enacted, to alien, was not taken away or abridged by this provision quoted, which has no application to a prior trust. *Dyett* v. *C. T. Co.*, 140 N. Y. 54.

Kuhn, 97 N. Y. 26 (32); *Cuthbert* v. *Chauvet*, 136 N. Y. 326 (330–331); *Yale* v. *Dederer*, 18 N. Y. 265 (267); *Douglas* v. *Cruger*, 80 N. Y. 15 (18). The prohibition covers attempts to pledge future income, or render future income subject to particular debts. *L'Amoureux* v. *Van Rensselaer*, 1 Barb. Ch. 34; *Van Epps* v. *Van Epps*, 9 Pai. Ch. 237 (240); *Noyes* v. *Blakeman*, 6 N. Y. 567 (579, 583); compare *McEwen* v. *Brewster*, 19 Hun, 337. Many other illustrative cases are cited *post*, § 499. Where a beneficiary borrows trust funds from the trustee, buys land in his own name, and gives back to the trustee a mortgage thereon, to cover the amount borrowed, the mortgage, and not the owner's equity in the land, is the trust fund, and consequently the beneficiary may sell that equity. *Baldwin* v. *Isham*, 25 Hun, 560. So the consent of the beneficiary to the shifting of trust property from one form of investment directed by the trust instrument, to another authorized by law, does not infringe the statute. *Wood* v. *Wood*, 5 Pai. Ch. 596 (600). So the statute has no application where there is no *trust*, but the property is vested beneficially subject to a power in the executors to invest and manage. *Graves* v. *Waterman*, 63 N. Y. 657. Nor to an assignment of income already accrued under a trust. *Matter of Valentine*, 5 Misc. 479; *Tolles* v. *Wood*, 99 N. Y. 616 (617–618). See a note in 10 Harv. L. Rev. 193, discussing *Hood Barrs* v. *Heriot* [1896], A. C. 174 (House of Lords). In cases of express trust, the disability imposed by the statute is not personal, but attaches to the trust property. The trust once created, the disability at once exists, and is imperative, and cannot be waived even by the creator of the trust. *Coster* v. *Lorillard*, 14 Wend. 265 (333). The beneficiary is not estopped from attacking the validity of his own illegal assignment of his beneficial interest. *Douglas* v. *Cruger*, 80 N. Y. 15 (19). As to the bearing of the statute, where a plaintiff in an action agrees to give his attorney a portion of the recovery, and then accepts in settlement of the litigation a life interest under an express trust created for that purpose by the other parties to the action, see *Kahn* v. *Brooklyn Trust Co.*, 5 App. Div. 495. In *Matter of Valentine*, 5 Misc. 479, it is held that an order signed by the beneficiary, directing the trustee to pay future income to B, authorized the trustee to make payments accordingly, as, while

B was in fact an assignee, the trustee had no notice that he was not a mere agent for collection. Such a principle would appear to subvert the entire purpose of the statute.

(*b*) *Assignable Interests.*

§ 498. **Grounds of assignability.**—The general purpose of the second clause of the statute above quoted, permitting assignments of the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, was to allow such assignments where the trust itself is intended not to protect the beneficiary against himself, but to turn over to him bodily a gross sum which he is to employ as he sees fit. Under this head fell obviously all trusts of the "first class," *i.e.*, to sell lands for the benefit of creditors; and of the "second class," *i.e.*, to sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon. *Matter of Ledrich*, 68 Hun, 396. Of course even a provision for payments out of the *corpus* to the beneficiary, by way either of trust or power, may be so conditioned as to prevent any transfer of the right. Thus, a power in the trustee to apply any or all of the principal to the beneficiary's use, if, and in so far as necessary for his support, does not give the beneficiary any right to dispose of the fund. *Bundy* v. *Bundy*, 38 N. Y. 410.

§ 499. **Annuities.**—The chief question of difficulty under this provision was that arising out of "annuities." The term itself is used rather loosely, but confining it for present purposes to a provision for successive periodical payments in specified sums, it will be seen that, viewed in one aspect, it might fall under class two, as a succession of sums in gross; while viewed in another, it belonged under class three, as a series of applications of income. In one case, it would be assignable; in the other, not. The discussion of the point has ranged over a wide field, and the decisions have been more or less conflicting. Illustrations of both views will be found in *Hawley* v. *James*, 16 Wend. 60 (117, 118, 119, 152, 156, 161, 192, 194, 275, 276); *Lang* v. *Ropke*, 5 Sandf. R. 363; *Griffen* v. *Ford*, 1 Bosw. 123 (142); *Radley* v. *Kuhn*, 97 N. Y. 26; *Wetmore* v. *Truslow*, 51 N. Y. 338 (344); *Phelps Ex'r* v. *Pond*, 23 N. Y. 69 (82–85); *Degraw* v.

Clason, 11 Pai. Ch. 136 ; *Hunter* v. *Hunter*, 17 Barb. R. 25 (92) ; *Gott* v. *Cook*, 7 Pai. Ch. 521 (535) ; s. c. on appeal, *sub nom. Kane* v. *Gott*, 24 Wend. 641 (664) ; *Livingston* v. *Freeland*, 3 Barb. Ch. 510 ; *Matter of Stutzer*, 26 Hun, 481 ; *Matter of Baker*, 6 Dem. 271 ; *Haviland* v. *Cocks*, 6 Dem. 4 ; *Matter of Tilford*, 5 Dem.524 ; *McGowan* v. *McGowan*, 2 Duer, 57 ; *Johnson* v. *Cornwall*, 26 Hun, 499, aff'd, 91 N. Y. 660 ; *Killam* v. *Allen*, 52 Barb. R. 605 ; *McSorley* v. *Wilson*, 4 Sandf. Ch. 515 (524) ; *Matter of Tilford*, 5 Dem. 524 ; *Bradhurst* v. *Bradhurst*, 1 Pai. Ch. 331 (346) ; *Clute* v. *Bool*, 8 Pai. Ch. 83 ; *Stewart* v. *Chambers*, 2 Sandf. Ch. 382 (393) ; *Stewart* v. *McMartin*, 5 Barb. R. 438 (445) ; *Coster* v. *Lorillard*, 14 Wend. 265 ; *Whitson* v. *Whitson*, 53 N. Y. 479 ; *Wolfe* v. *Wolfe*, 2 Dem. 305 ; *Rider* v. *Mason*, 4 Sandf. Ch. 351 ; *Mason* v. *Mason's Ex'rs*, 4 Sandf. Ch. 623, aff'd 13 Barb. R. 461 ; *Smith's Ex'rs* v. *Wyckoff*, 3 Sandf. Ch. 77. In *Radley* v. *Kuhn*, 97 N. Y. 26, it was held that "where the sole object of the trust is to pay a sum in gross, by collecting and accumulating rents, etc., to a specific amount, the *cestui que trust* may release or assign. . . . The trust is a mere mode of securing the payment of the amount of the legacy, and not a provision for the maintenance of an infant," etc. In that case, the will called for the accumulation and payment of one lump sum of $700 to each of two infants. The further remark that "only a trust to receive rents and profits of land and apply them to the use of a person *generally*, or a trust to accumulate rents and profits *generally*, for the benefit of one or more minors, renders the estate inalienable," was a dictum. In *Cochrane* v. *Schell*, 140 N. Y. 516, it was held that a trust to receive rents and profits of land, and *therefrom* to pay annuities of specified sums, as $10,000 a year, or $3000 a year, fell within the third subdivision of § 55 of the Statute of Uses and Trusts, and was valid if duly limited as to duration, and was affected by § 63 as to non-assignability. It is not a "sum in gross." The principle thus established appears to rest chiefly on the distinction between, on the one hand, a provision for successive payments *from income*, whether of the whole, or of a given aliquot fraction, or of a specific sum, intended for maintenance, and, on the other hand, a provision for the payment of a *single sum*, payable either at one time or in in-

stalments, either from the corpus of the estate, or, apparently, from income. The cases of *Radley* v. *Kuhn*, 97 N. Y. 26 and *Cochrane* v. *Schell*, 140 N. Y. 516 seem inconsistent in this: In the former, a trust to accumulate rents, etc., in order to make up, and then pay a fixed sum ($700) was held *valid*, *under subdivision* 4, § 55, but though a *valid trust*, the payment being of a lump sum, it was alienable and created no suspension. In the latter, a trust to pay annuities (of $3000) from rents, etc., was held *valid*, under the third class (thus far being consistent), but the payments, being periodical and successive, and not merely one, either in whole or in sections, were not "gross" or "lump," and so not assignable. These decisions may be reconciled on the ground that in the former there was to be *one* payment only, evidently not for maintenance, while in the latter, it was for annual payments, evidently for maintenance. But no trust for accumulation is for maintenance. Therefore the question of maintenance hardly seems the proper test of non-assignability. The court, after holding that it is inalienable, expressly add "But if an annuity may be considered as a gross sum, we do not perceive that it would change the result in this case, provided a *trust for the payment of annuities* may be created under the third subdivision of § 55. The case of *Radley* v. *Kuhn* (97 N. Y. 26) is an example of a provision in a will for the payment of a gross sum within the statute." But in the *Radley* case, while the payment of a gross sum was held within the statute, it was held *not* to be within § 63 forbidding assignment. Therefore, in the *Cochrane* case, the court distinctly limit their actual decision to the point that a trust for the payment of annuities in specified sums may be valid under subdivision 3. The question of whether it is or is not alienable, which is generally the only important question, is really left undecided. The expression of the view of all the judges sitting is, however, so carefully reasoned and so emphatically stated that it may fairly be taken to settle the vexed question whether a trust to pay a specified sum, periodically, from income, *may* belong under the third subdivision of § 55 of the Revised Statutes, and thus render the beneficial interest inalienable. The rule laid down in this case is hardly definite enough to always prove a sure guide. One difficulty was thus removed, leaving the only remaining difficulty one of

intent, in cases where it might be hard to say whether the purpose was to provide the payment of a fixed sum in instalments, or a fixed annual payment for maintenance. *Cochrane* v. *Schell*, 140 N. Y. 516. In *Matter of Stanfield*, 135 N. Y. 292 (297), it is said that "An annuity usually consists of a gross sum payable in any event, while income must depend upon the earnings of the estate, or some part of it, after deducting lawful charges and commissions, and, of course, if not earned, cannot be paid." Some further light may be thrown by a number of earlier decisions. In *Kearney* v. *Cruikshank*, 117 N. Y. 95, a devise and bequest to trustees to receive the rents, etc., and out of the net income to pay to A the sum of $2000 a year for life, was construed as a trust to pay an annuity. It also appears clearly to have been a trust of the third class. Instead of directing the trustee to apply the income from a given fund, testator may fix the sum to be paid as income, and direct the setting apart of a sufficient fund to yield that sum. In that case, the amount of the fund may be fixed, and from time to time readjusted, by the surrogate. *Matter of Willets*, 112 N. Y. 289 (297). While in *Cochrane* v. *Schell*, 140 N. Y. 516 (535), it was held that in creating a trust, the testator may properly subject the entire income to securing the payment of certain annuities, which are much less than the probable total income, if his purpose is real, and not merely nominal or intended to cover a practical and illegal accumulation. In *Delaney* v. *Van Aulen*, 84 N. Y. 16, there was a trust to receive rents and profits, and apply them to the use of A for life, except that the trustees should apply therefrom to the use of B, for life, a specified annual sum. This latter was treated as a trust of the third class. See also *Masterson* v. *Townshend*, 123 N. Y. 458 (461); *Matter of Chauncey*, 119 N. Y. 77; *Matter of Smith*, 131 N. Y. 239 (241). In addition to the annuities provided for under the second class, and those authorized under the third class, of trusts, annuities may of course be created without any trust or even power in trust. Thus, the duty of paying them may be left to the executor, acting merely as such. *Clark* v. *Clark*, 147 N. Y. 639 (644). A direct legacy payable yearly from rents and income, or a direct legacy of certain shares of the income, creates no trust at all. *Hatch* v. *Bassett*, 52 N. Y. 359. Annuities may be charged on

property and involve no trust, *Phillips* v. *Phillips*, 112 N. Y. 197; *Matter of Collins*, 144 N. Y. 522 (528), or provided for by giving property to an individual or to a charitable corporation subject to the payment of annuities. *Booth* v. *Bapt. Church*, 126 N. Y. 215 (245). A distinction between the use and income of a specific fund, and a legacy of the interest thereof, is that in the former case the taxes on the fund, and expenses of the trust, must be paid from the income; while in the other case those items are chargeable on the estate. *Whitson* v. *Whitson*, 53 N. Y. 479; *Wolfe* v. *Wolfe*, 2 Dem. 305; *Ex parte McComb*, 4 Bradf. 151.

§ 500. **Test of distinction.**—On the whole, it would appear from the cases that the proper line of distinction between successive payments of gross sums under class two, and periodical payments of interest under class three, as established under the Revised Statutes, might be laid down as follows: (1) Where a trustee is directed to receive the rents and profits and apply or pay them over *as such*, the trust belongs to the third class, and this whether the rents are to be paid wholly to one person, or to several, see *Hobson* v. *Hale*, 95 N. Y. 588, 610; but (2) where he is directed to pay a specific sum of money, as such, and not as rents and profits, and whether in one lump sum or in successive specified lump sums, the trust belongs to the second class, and the gift is either a legacy, in the usual sense, or an annuity, according to circumstances.

§ 501. **Agreement to release.**—If testator's will creates a trust to pay income to one for life, and the beneficiary agrees with *testator*, that after a certain term under the trust he will release his interest, this is said to be valid and binding. *Matter of Minturn*, 5 Dem. 508. Compare *Williams* v. *Fitch*, 18 N. Y. 546.

§ 502. **Personal property trusts.**—The statute applies, though only by way of analogy, *Graff* v. *Bonnett*, 31 N. Y. 9; *Mills* v. *Husson*, 140 N. Y. 99 (105) and other authorities cited *post*, § 765 *b*, to corresponding trusts of personal property. But it might on some grounds appear to have a wider scope in refer-

ence to personal than in the case of real property trusts. For the purposes for which a trust of personal property may be created are not restricted. *Ante*, § 414. Therefore a trust to receive income of personalty may also be a trust to use that income in any one of numerous ways, while a trust to receive rents of land must also (apart from payment of debts) be a trust to pay annuities or legacies, or to apply the rents to the use of designated persons, or to accumulate them for infants. Perhaps some basis may be found for this suggestion in the cases cited in the opinion in *Hillyer* v. *Vandewater*, 24 N. E. Rep. 999 (1005).

§ 503. **Assignment under void trust.**—If persons who suppose themselves to be beneficiaries of a trust to receive and apply income (and who are also heirs of the testator) assign their claim on trust income, the assignment is void, whether there is a trust or not: (1) As beneficiaries they cannot assign; (2) as heirs they hold an absolute title, and the assignment fails because only intended to carry their interests as supposed beneficiaries and not to create a legal life tenancy. *Harvey* v. *Brisbin*, 50 Hun, 376 (380), aff'd 143 N. Y. 151. As to the second point, compare *Young* v. *Purdy*, 4 Dem. 455 (461).

(2) *Under the Real Property Law.*

§ 504. **The statute of 1896.**—On October 1st, 1896, the provision above quoted was succeeded [1] by a new section which reads as follows: "[1] The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, cannot be transferred by assignment or otherwise; but [2] the right and interest of the beneficiary of any other trust may be transferred." Real Prop. L., § 83. This is also accompanied by a new definition of the second class of trusts, *i.e.*, "to sell, mortgage or lease real property for the benefit of *annuitants* or other legatees, or for the purpose of satisfying any charge thereon," Real Prop. L., § 76, the words "annuitants or other" being new. The present statute, therefore, specifically recognizes the principle that annuities may be

[1] But the old section was specifically reserved from repeal. Real Prop. L., § 300, and the schedule there given of laws repealed.

created under the second class—a point well settled before—and substitutes for the distinction between trusts "for the receipts of the rents and profits of lands" and trusts "for the payment of a sum in gross;" a distinction between trusts to receive and apply rents and profits of real property to the use of a person, and all other trusts. But clearly a trust, under the third class, for the payment of successive sums from rents and profits *may* still be created, so that the old difficulty of determining whether a provision for successive payments is or is not assignable hardly seems to be cleared up. If the new provision accomplishes anything, it perhaps gives added support to the principle of distinction suggested *ante*, § 500. The effect of the statutory change upon trusts of personal property is obscure. The former statute was applied to real property by analogy. *Post*, § 765 *b*; *ante*, § 502. The new statute, like the former, applies in terms only to real property, but the former stands unrepealed, except in so far as it is repealed by implication.

§ 505. **Extinguishment by beneficiary.**—If the beneficiary is also the remainderman, he may now extinguish the trust and merge the trustee's estate in the remainder. See *post*, § 528. See also *post*, § 527, as to the extinguishment of certain trusts for married women, on request of the beneficiary and approval of the court.

CHAPTER X.

CHARITABLE USES AND TRUSTS.

§ 506. **Introductory.**—"The characteristics of a charitable use before the Revised Statutes were indefiniteness and permanence; indefiniteness in that the trust was for the benefit of a class or the public and not for a particular person; permanence in that the rules relating to perpetuities had no relation to charity, unless the execution of the charity was postponed." Fowler, Charitable Uses, 100. "Limitations, settlements or gifts, intended to benefit the public, or which have some educational, benevolent, charitable or religious end, usually present two characteristics; they are permanent in operation and they are indefinite or uncertain in respect of the real or individual beneficiaries." (*Id.* 1.)

The subject of trusts for charitable purposes, and of direct devises and bequests to charitable corporations, is discussed in two recent books relating to the law of New York.[1] Mr. Robert Ludlow Fowler's work covers the whole field, including transfers of property to charitable corporations; but where such corporations take, there is, under the theory of our law, no *trust* at all. The corporation takes as an absolute beneficial grantee, devisee or legatee. All its property must, it is true, be employed in furtherance of the purposes of its creation, but this does not imply that it is a trustee; it is only another way of saying that its ownership is absolute, but is adapted in its incidents to the artificial nature of the owner. *Wetmore* v. *Parker*, 52 N. Y. 450. *Bird* v. *Merklee*, 144 N. Y. 544.

The corporation enjoys over the property the fullest and most complete control which its corporate nature renders it capa-

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[1] Very fully in Fowler on the Law of Charitable Uses (1896); and with special reference to Suspension, in Chaplin on Susp. Pow. Aliena. (1891).

ble of possessing. *Matter of First P. S. of B.*, 106 N. Y. 251. Compare *Simmons* v. *Burrell*, 8 Misc. 388 (395), aff'd 83 Hun, 615. It is only on this theory of the entire absence of a trust, that such dispositions have been supported. For they obviously do not fall within any of the four purposes specified by the statute as authorized in reference to real property. And all other express trusts in real property have been abolished. Real Prop. L., § 71. And whether the property were real or personal, if they were trusts, the beneficiaries would be indefinite, and the term illegal. It is only by regarding them as absolute that they are saved. Therefore, as such dispositions to charitable corporations are not trusts, they do not fall within the scope of the present book, and will not be further considered. This chapter is devoted to the subject of transfers of property not to corporations as absolute owners, but to trustees, in trust, for charitable, benevolent, religious or educational purposes. And first as to the period from the adoption of the Revised Statutes to May 13th, 1893 (L. 1893, ch. 701).

(1) *Prior to May* 13, 1893.

§ 507. **Real property.**—By the Revised Statutes, 1 R. S. 727, § 45 ; now Real Prop. L., § 71, all uses and trusts in real property not therein authorized were abolished. Among others not thus authorized were all those for charitable purposes. *Bascom* v. *Albertson*, 34 N. Y. 584 (615) ; *Holmes* v. *Mead*, 52 N. Y. 332 (339) ; *Riker* v. *Leo*, 115 N. Y. 93 (102) ; 133 N. Y. 519 ; *Cottman* v. *Grace*, 112 N. Y. 299 (306–307). It may be here suggested that although charitable uses and trusts, as such, in real property, had thus been abolished, yet a *quasi* charitable purpose might to some extent be attained under the third class of permitted trusts : *i.e.*, the trust to receive and apply rents and profits to the use of any person during the life of that person, or for a shorter term. For example, a trust might be created to receive the rents and profits and apply them in shares to the use of certain numerous but designated poor children, during their respective lives. Such a trust might be created, but it would not be a charitable trust, in any proper sense. The fact that the children are poor is immaterial. It is a personal trust for the benefit of certain individuals, and it is restrict-

ed to their lives. So a *quasi* charitable trust might be created to sell, mortgage or lease lands to pay legacies to a large number of ascertained poor children. But it would not be a proper charitable trust. It appears, therefore, quite accurate to say that no charitable express trust whatever, in real property, could, under the Revised Statutes, be created. See *ante*, § 366.

§ 508. **Personal property.**—It has been frequently held, and is well settled, that this statutory abrogation of all trusts, except the four classes specified in the statute, does not apply to personal property trusts. *Holmes* v. *Mead*, 52 N. Y. 332 (343). *Post*, § 766 *a*. So that so far as this particular provision goes it abolished only charitable trusts in real property, and not those in personal property. In personal property trusts may be created for any purpose not in its nature improper. *Ante*, § 414. But in so far as any trust in personal property effects suspension of the absolute ownership, it falls within the operation of the statute forbidding such suspension beyond two lives in being. *Ante*, § 387; Fowler, Charitable Uses, 97–98. And in so far as the beneficiaries were indefinite or uncertain, it was hostile to the general and settled policy of the State, which does not, apart from the new statute considered *post*, § 513, allow trusts in either real or personal property save for definite and ascertained beneficiaries, *ante*, § 366, and which provided, as the sole scheme for the attainment of such a purpose, a system of corporations which might take, hold and use property, as their own, for the charitable purposes of their creation. *Ante*, § 506; *Levy* v. *Levy*, 33 N. Y. 97; *Bascom* v. *Albertson*, 34 N. Y. 584; Fowler, Char. Uses, 97–98, 102. But while it is thus true that charitable express trusts in the proper sense, involving unrestricted duration, and uncertainty in the beneficiaries, could be created in neither real nor personal property, yet as to both a trust might be created, as already suggested, bearing a certain resemblance to a charitable trust in that the beneficiaries might be very numerous, and the purpose of the creator of the trust might be of an obviously charitable nature. Thus, a trust might be created to receive and apply rents to the use of a hundred, or a thousand, specified poor children, regarded as tenants in common of the beneficial interest, the trust as to each ceasing at, or before, his respective

death. Such a trust would be valid because for an authorized purpose, and neither perpetual nor indefinite. It would, however, not be a charitable trust, but it would, so long as it lasted, bear a certain resemblance to a charitable trust. Now, on this point, the following distinction would exist between trusts of real and trusts of personal property : That in real property, such a *quasi* charitable trust would be restricted to the purpose of receiving and applying rents, in shares (or to that and also the purpose of selling, mortgaging or leasing to pay legacies and annuities). But in personal property (and under powers) the purpose of such *quasi* charitable trusts might take a wider range (though still bounded by the requirements of certainty and compliance with the law relating to suspension).

§ 509. **Powers.**—As the Revised Statutes permitted the creation of powers in trust for any purpose not contrary to law, 1 R. S. 732, § 74, Real Prop. L., § 111 ; 1 R. S. 729, §§ 58, 59, Real Prop. L., § 79, but at the same time prohibited any employment of them to effect an undue suspension of the power of alienation, 1 R. S. 732, § 74, Real Prop. L., § 111 ; 1 R. S. 737, § 128, Real Prop. L., § 158 ; 1 R. S. 724, §§ 14, 15, 16, Real Prop. L., § 32 ; 1 R. S. 725, § 36, Real Prop. L., § 50 ; *post*, Chap XXII., and applied to them the same principle requiring definite beneficiaries, *post*, Chap. XIX. ; Fowler, Char. Uses, 111–112 ; *Tilden* v. *Green*, 130 N. Y. 29 ; *Fosdick* v. *Town of Hempstead*, 125 N. Y. 581 (592) ; *Power* v. *Cassidy*, 79 N. Y. 602, it would appear that powers might be created to effectuate *quasi* charitable uses, in respect to real property, in the same cases, and with the same limitations, as trusts in respect to personal property. Fowler, Char. Uses, 97. And subject to these same limitations as to definiteness and a restricted term, an attempted *express trust* for such *quasi* charitable purposes as have already been discussed might be turned into a power under the operation of the statute. 1 R. S. 729, §§ 56, 58, 59, Real Prop. L., §§ 77, 79. And an imperative power to sell would convert land into personalty, and render it subject to the principles affecting personal property. A distinction is also to be noticed between such trusts and powers as do, and such as do not, suspend the power of alienation or ownership of real or personal property, *ante*,

Chap. VI. ; *post*, Chap. XXII. In those that do not effect that result, *e.g.*, trusts to sell to pay legacies, the indefiniteness of the beneficiaries would seem to have been, during the period under consideration, the only objection to a technical trust for charitable purposes. See *Power* v. *Cassidy*, 79 N. Y. 602, as explained in *Fosdick* v. *Town of Hempstead*, 125 N. Y. 581 (591–592).

§ 510. **Summary.**—The law of charitable uses, therefore, contemplated permission of (*a*) an indefinite class of beneficiaries ; (*b*) an unlimited term ; and that (*c*) they were entirely abolished, as to real and personal property, and whether under trusts or powers, but (*d*) certain *quasi* charitable trusts and powers could still be created, restricted, in cases of suspension, to the statutory term, and in all cases to the benefit of persons who might be very numerous but must be definitely ascertained ; and (*e*) the particular purpose of these *quasi* charitable trusts was restricted, in real property by the terms of the statute specifying the purposes authorized, and in personal property, or under powers, to any purpose not contrary to law ; and that (*f*) the only method (with a few special statutory exceptions like the Shaker Trusts) provided by law for accomplishing a similar end, without a time limit or a definite description of the individuals who might ultimately and indirectly secure a benefit, lay in the system of corporations chartered for charitable purposes. *Bird* v. *Merklee*, 144 N. Y. 544. And as to the subject of indefiniteness in the beneficiaries, see *ante*, § 366.

§ 511. **Exceptions.**—The Legislature had taken away, and the Legislature might give again, the power to create charitable uses, untrammelled by these restrictions. Some such exceptions were from time to time created. For example, in R. L., ch. 60, § 4 (1813) is found an exception, under which property, both real and personal, might be held for the use of an unincorporated religious society, without any restriction as to time, except the indefinite future incorporation of the society. *Church of Redemption* v. *Grace Church*, 68 N. Y. 570 (583) ; *Foote* v. *Bryant*, 47 N. Y. 544 ; *Reformed P. D. Church* v. *Brown*, 4 Abb. Ct. App. Dec. 31. The Shaker Trusts furnish another illustra-

tion. *White* v. *Miller*, 71 N. Y. 118. Also *ante*, p. 255, note.

§ 512. **Benevolent, religious, and educational uses.**—Though the history and status of benevolent and religious uses, sometimes roughly classed as charitable, varied to some extent from those of charitable uses proper, at the time of the enactment of the Revised Statutes, *People* v. *Powers*, 147 N. Y. 104 (110); Fowler, Char. Uses, 108, yet they were then all abrogated, and the same principles already discussed applied to them. Educational uses fell within the scope of charity. Fowler, Char. Uses, 108.

Since May 13, 1893.

§ 513. **L. 1893, ch. 701.**—On May 13th, 1893, a general law went into effect, providing that "§ 1. No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects be valid under the laws of this State, shall or be (*sic*) deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the Supreme Court.

"§ 2. The Supreme Court shall have control over gifts, grants, bequests and devises in all cases provided for by section one of this act. The attorney-general shall represent the beneficiaries in all such cases and it shall be his duty to enforce such trusts by proper proceedings in the court."

It will be noticed that this act applies to both real and personal property. It has not been repealed, unless, as to real property, by implication, but in the Real Property Law which went into effect October 1st, 1896, the following provision appears:

§ 514. **Real property law.**—"A conveyance or devise of real property for religious, educational, charitable or benevolent uses,

which is in other respects valid, is not to be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument making such conveyance or devise. If in such instrument, a trustee is named to execute the same, the legal title to the real property granted or devised shall vest in such trustee. If no person is named as trustee, the title to such real property vests in the Supreme Court, and such court shall have control thereof. The attorney-general shall represent the beneficiaries in such cases and enforce such trusts by proper proceedings." § 93. The result of these acts seems to be that they remove the objection to indefiniteness, but do not remove any objection to undue suspension. For they specifically apply only to such transfers of property for charitable, etc., uses as are "in other respects valid" apart from "the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder." Now no such use or trust, if it causes suspension of the absolute power of alienation of real property, or of the ownership of personal property, is "in other respects valid" unless it is restricted to the term of two lives in being or a shorter period.[1] It would seem, therefore, that it is only dispositions thus limited, or dispositions not involving suspension at all, that are saved by the statutes from failure through indefiniteness. It may also be that these statutes only refer to such dispositions (so far as concerns express trusts in real property), where their purpose is to receive and apply rents and profits to the use of the indefinite persons, or to sell, mortgage or lease to pay legacies or annuities to indefinite persons. For the trust saved must be one valid in other respects than that of indefiniteness. It might, however, be held that this statute has added a fifth purpose to those enumerated in § 76 of the Real Property Law, which is not affected by the limitations imposed upon the original four classes. So also, from the nature of the case, where the power of alienation is suspended, it would appear that whereas ordinary trusts *may* be, these charitable trusts *must* be, limited by the duration of two lives of *third par-*

[1] Notice, however, the possibility that under the Real Prop. L. express trusts are no longer restricted to two lives in being. *Ante*, §§ 383, 386.

ties, the beneficiaries themselves being indefinite. The statute does not attempt to alter or impair any vested estate, interest or right, and could not have had any such effect. Real Prop. L., § 1 ; *Dammert* v. *Osborn*, 140 N. Y. 30 (43), 141 N. Y. 564 ; *Butler* v. *Trustees*, 92 Hun, 96 (101). Upon the general subject of indefiniteness of the beneficiaries, see *ante*, §§ 365–369.

CHAPTER XI.

ATTEMPTED EXPRESS TRUSTS.

§ 515. **Introductory.**—The law contemplates at least seven groups of attempted trusts in real property (one being valid, and the others either (1) void or voidable as to all the world, or as to certain persons, or (2) invalid as trusts, but enforceable on some other theory), and it deals with them as follows :

(1) *First Group.*

§ 516. **Valid express trusts.**—The first group, embracing four subdivisions, covers all the express trusts in real property, authorized by law ; they are defined in § 76 of the Real Property Law. See also Chap. X., *ante*, as to trusts for charitable, etc., purposes. No such limitation of purposes applies to trusts of personal property. *Ante*, § 414. The statute of uses and trusts groups together all trusts in real property except those thus specifically saved, and prohibits them. *Ante*, § 394. The prohibition is complete and sweeping. *Holmes* v. *Mead*, 52 N. Y. 332 (339). But though it prohibits them as trusts, that is, prohibits the use of the trust form, to attain the proposed purpose, yet the adoption of that prohibited form does not always nullify the attempted scheme so far as its essence goes, as distinguished from the form, as appears below.

(2) *Second Group.*

§ 517. **Trusts valid as powers.**—This second group comprises two classes of attempted active express trusts, which the law, instead of annulling *in toto*, renders valid as powers in trust. (*a*) In the first class, fall those which cannot be sustained as express trusts because their purpose is not one of the four enumerated in Real Prop. L., § 76 above mentioned, and yet the objection ap-

plies only to the form, and not to the end proposed, *e.g.*, a grant or devise to a trustee to effect a partition. (*b*) In the second class fall testamentary trusts, the purpose of which is to effect a sale or mortgage, but which omit any authorization to the trustee to receive the rents and profits. Here the purpose may (or may not) be *per se* within the four enumerated classes, *e.g.*, a devise to a trustee to sell for the benefit of creditors, or to sell or mortgage for the benefit of annuitants or other legatees or to satisfy charges, would have a statutory *purpose;* while a devise to sell or mortgage, but not for the benefit of the respective classes just mentioned, would not have a statutory purpose. But whether the purpose is within the four prescribed classes or not, if the will fails to authorize the trustees to receive rents and profits, an attempted testamentary trust to sell or mortgage is by the statutes turned into a power in trust.

In both classes, the devise of the title to trustees fails, and the proposed trustees take merely a power, to which the title is subjected, to enable them to carry out the purpose of the attempted trust. *Henderson* v. *Henderson*, 113 N.Y. 1 (11). This subject is fully discussed *post*, § 552. See also *ante*, § 146 ; *post*, § 523.

(3) *Third Group.*

§ 518. **Passive trusts.**—Where the only defect is that the trust is wholly passive, or so far passive that the beneficiary is entitled both to actual possession and to the receipt of the rents, see *Townshend* v. *Frommer*, 125 N. Y. 446 (456–459), the *form* is invalid, but the *substance* is attained by vesting the property directly in the proposed beneficiary, *Downing* v. *Marshall*, 23 N. Y. 366 (379), under §§ 72 and 73 of the Real Property Law, which provide as follows :

(*a*) " Every person, who, by virtue of any grant, assignment or devise, is entitled both to the actual possession of real property, and to the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest ; but this section does not divest the estate of the trustee in any trust existing on the first day of January, eighteen hundred and thirty, where the title of such trustee is not merely nominal, but is connected with some power of

actual disposition or management in relation to the real property which is the subject of the trust." Real Prop. L., § 72.

(*b*) "Every disposition of real property, whether by deed or by devise, shall be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to another to the use of, or in trust for, such person; and if made to any person to the use of, or in trust for another, no estate or interest, legal or equitable, vests in the trustee. But neither this section nor the preceding sections of this article shall extend to the trusts arising, or resulting by implication of law, nor prevent or affect the creation of such express trusts as are authorized and defined in this chapter." Real Prop. L., § 73.

Illustrations are found in a trust of land, to be used "for the interest of A," *Ramsay* v. *DeRemer*, 65 Hun, 212; "for the benefit of A," *Hopkins* v. *Kent*, 145 N. Y. 363; "in trust for A," *Syracuse Sav. Bk.* v. *Holden*, 105 N. Y. 415 (418); *Rawson* v. *Lampman*, 5 N. Y. 456; *Ennis* v. *Brown*, 1 App. Div. 22 (25); a conveyance in trust, giving the beneficiary right to full possession and enjoyment, *Woerz* v. *Rademacher*, 120 N. Y. 62 (67); to stand seized to the use of another, *Mott* v. *Ackerman*, 92 N. Y. 539 (548); "in trust for the use of the grantee and his children," *Fisher* v. *Hall*, 41 N. Y. 416; to execute a deed of conveyance to A, *Adams* v. *Perry*, 43 N. Y. 487 (495–496); an absolute devise to A, for life, the lands to "remain in the hands of the executors," *Knight* v. *Weatherwax*, 7 Pai. Ch. 182. See also *ante*, §§ 471–4. Compare *post*, §552 *b*.

Though property be conveyed to A merely "in trust" for B, and so vests absolutely in B under the statute, yet if, in connection with the conveyance, A gives back a mortgage thereon to the grantor, B takes title subject to the mortgage. The deed and mortgage, being simultaneous, constitute one transaction, so that all that is really conveyed to A is the equity; and the statute gives B only what was conveyed to A. *Coutant* v. *Servoss*, 3 Barb. R. 128; *Rawson* v. *Lampman*, 5 N. Y. 456. The statute, however, does not operate to vest the title in the proposed beneficiary if a direct devise to him would have been void, *e.g.*, on the ground of alienage. *Beekman* v. *Bonsor*, 23 N. Y. 298 (316). And so if the so-called trustee has himself an individual part interest in the property affected, the statute does not

operate to vest title in the beneficiary. The legal title in such a case is not merely nominal. *King* v. *Townshend*, 141 N. Y. 358 (364); *N. Y. Dry Dock Co.* v. *Stillman*, 30 N. Y. 174. A bequest "in trust," for the life of the "trustee," remainder to his issue, if any, otherwise to other persons, naming no purpose and no beneficiary of the trust, may be supported, as a matter of construction, as a bequest to the "trustee" beneficially for life. *Hitchcock* v. *Peaslee*, 89 Hun, 506, 145 N. Y. 547. Also *Chadwick* v. *Wilson*, 73 Hun, 485. In such a case, the life tenant would be held as a constructive trustee to preserve the remainder, and the will may be interpreted as using the term trustee in that sense. Where a trust is merely passive, as, to hold the title in the name of the trustee, in trust for A, a third party, the trustee cannot be required to convey the record title to A. The statute invests the proposed beneficiary with a complete and absolute legal and equitable title and no conveyance is required; and furthermore, while a trustee may be required to perform the requirements of a trust, this trust did not require him to convey. The beneficiary must rest on the statute. *Ring* v. *McCoun*, 10 N. Y. 268.

The rule may be otherwise, where an active trust is created for a valid purpose, with a direction to the trustee to convey at the end of the term. In such a case the second objection just mentioned would have no force. But as the remainder vests irrespective of a conveyance, the first objection just mentioned would seem to apply. The remainder being already vested, and the trust to convey being a mere power, it would seem quite unnecessary to have the grantee of the power convey to those who already hold the absolute legal title even as a matter of record. But see *Anderson* v. *Mather*, 44 N. Y. 249; *King* v. *Whaley*, 59 Barb. R. 71. Compare *post*, §§ 523 and 613.

There are cases in which the mere addition of the word "trustee" to the name of the grantee in a conveyance naming no beneficiary and defining no trust may be regarded as a mere *descriptio personæ*, in the absence of other evidence, and he may convey a clear title. *G. L. & P. J. R. R. Co.* v. *N. Y. & G. L. R. R. Co.*, 134 N. Y. 435; *Towar* v. *Hale*, 46 Barb. R. 34. And even where a conveyance runs to B "as trustee" for an unincorporated association designated, defining no trust,

the grantor is estopped from claiming that title did not vest in the "trustee," and a purchaser from the latter may, it appears, be compelled to accept title, upon the theory that the law will presume that the "trust" was valid and was duly defined in some other instrument. *People* v. *Stock Brokers' Building Co.*, 49 Hun, 349, aff'd 112 N. Y. 670, where, however, the facts were such as to sustain the decision upon other grounds.

(4) *Fourth Group.*

§ 519. **Trusts valid as charges.**—Another class of attempted trusts is found in cases where the trust is not valid as such, because its purpose is not one of those specified by statute; and yet cannot be turned into a power, for its method is too indefinite; nor can the title pass directly to the proposed beneficiary, for the purpose, though indefinite, is evidently active, and not passive; nor is the whole scheme void, for it seeks no unlawful end, involves no legal inconsistency or impossibility, and suffers from no defect in the title transferred. There is an obvious intent to vest the entire title, and to have certain specified ends attained by the grantee, for the benefit of another. The difficulty arises from the absence of any specification of a way in which the property conveyed is to be employed in attaining those ends. In such a case, there is no valid trust, but the title may, in some instances, vest in the grantee or devisee subject to a charge. Thus A conveyed land to B and his heirs, in trust to secure to A a good comfortable maintenance for life; and it was held that B took an absolute fee, subject to a charge for the support of A. *Mott* v. *Richtmyer*, 57 N. Y. 49 (54, 64). So an attempted trust might be effectuated by sustaining the transfer and holding the grantee bound as by a contract to perform the purposes specified. These cases may perhaps best be explained on the theory that the court, in the endeavor to sustain rather than defeat a general scheme of disposition, reads the instrument, as a matter of construction, as intended to create not a trust, which would fail because not duly set forth, but a charge on the property transferred, or, upon acceptance by the transferee, of a contract.

(5) *Fifth Group.*

§ 520. **Void trusts.**—There is, however, a group of attempted express trusts, comprising several classes, which the law holds either absolutely void or voidable, and ineffective for any purpose or in any manner.

(*a*) In the first of these classes, an essential and controlling feature of the entire scheme involves something which the law, on one ground or another, frowns upon and will not tolerate. For example, an express trust for even a valid purpose, which attempts to suspend the absolute power of alienation for an illegal period. Another illustration is found in a trust for the benefit of an undefined class, where the law disapproves because there is no one to enforce the trust. (See *ante*, Chapter IV.) If such a trust is for a charitable, religious, benevolent or educational purpose, and is in other respects valid, it is now saved by § 93 of the Real Property Law ; and L. 1893, ch. 701. *Ante*, Chapter X. ; *Holland* v. *Alcock*, 108 N. Y. 312 ; *Prichard* v. *Thompson*, 95 N. Y. 76 ; *Jarvis* v. *Babcock*, 5 Barb. R. 139 ; *Matter of Foley*, 2 Con. 298.

(*b*) In a second class, the trust seeks to accomplish a purpose which cannot be termed wrongful in any sense, but which can, according to legal principles, be carried out only by a person vested with the legal title ; and which nevertheless has not one of the purposes specified by the statute enumerating the permissible express trusts. For example, a devise to one in fee, and a trust to another to enforce a forfeiture if certain conditions subsequent are not performed by the devisee of the fee. *Adams* v. *Perry*, 43 N. Y. 487 (496).

(*c*) A third class comprises attempted trusts which are fatally defective because they omit some essential incident to legal devolution of the title. Under this head fall cases where there has been no legal *delivery*. *Ante*, Chap. II. So an attempted gift of donor's own promissory note (payable in five years), the interest to be used in spreading the Gospel, during the life of the donee, and then the principal turned over to certain charitable corporations, is void as being a mere *promise to give*. *Phelps' Ex'r* v. *Pond*, 23 N. Y. 69 (78). But the mere failure to designate a trustee does not invalidate a testamentary trust otherwise

complete. *Ante*, § 121. And though a testator fail in his attempt to create a trust, as by a defect in the execution of the will, yet of course the heirs and next of kin may give the property to those named as executors (or to others) in trust for the same purpose. *Dupre* v. *Thompson*, 8 Barb. R. 537. In this case, if the intended executors are appointed by the surrogate as administrators, they act first under that appointment to settle the estate, and then as trustees of the same property under the deed of the heirs and next of kin. *Id.*

(*d*) A fourth class comprises attempted trusts whose terms and purpose are so indefinite that there is nothing that the law can lay hold on and establish and enforce. In such a case, the attempted trust cannot be sustained as a power, because a power, like a trust, must be for some particular purpose sufficiently definite to lay a basis for its enforcement. *Post*, § 621. *Clapp* v. *Byrnes*, 3 App. Div. 284 (291–293); *Marvel* v. *Stone*, 3 App. Div. 413.

(*e*) A fifth class covers the case where the property which the trust instrument purports to transfer does not belong to the testator or grantor, or where, if he attempts to transfer it under a power, it is not in fact covered by the power, or the power is not duly exercised. Analogous to such a case is that where a testator attempts by will to create a power of sale over land which he does own, and where, after execution of the will, a child is born, who, being an only child, and not provided for by the will or otherwise, is entitled under the statute to all the property to which the power relates, as if there had been no will. Under such circumstances, the power is nullified, and the child may recover the land in an action in ejectment against a purchaser in good faith from the donee of the power. *Ante*, § 299. And if the property in such a case were devised to a trustee, an after-born child would according to the circumstances, either take as under an intestacy, or have his action against the trustee to recover his share of the property, and thus frustrate the trust scheme either wholly or in part. 2 R. S. 65, § 49 as amended. But see *post*, end of § 524.

Trusts which would be illegal if expressed on the face of the instrument, but which are attempted by an instrument absolute on its face, coupled with a secret arrangement for the carrying

out of the purpose by the transferee, are for convenience considered by themselves in the following section. And as to trusts thus attempted, which might have been legally expressed on the face of the instrument, see *post*, p. 405, note 2.

(6) *Sixth Group.*

§ 521. **Secret trusts.**—Where an owner of property wishes to accomplish a purpose which cannot be lawfully accomplished by way of an express trust, *e.g.*, a trust for beneficiaries to be selected by the trustee, he may lawfully, if he wishes, transfer the property absolutely, *inter vivos* or by will, to another, relying on the belief, not embodied in any agreement or imposed as an obligation, that the latter may employ it for such ends. If the transfer is really absolute, so that the property becomes, *bona fide*, the property of the transferee, and he is free to keep it for himself if he wishes, and is not even under a moral obligation to employ it otherwise, the arrangement is valid. There is no trust. *Riker* v. *St. Luke's Hospital*, 35 Hun, 512, aff'd 102 N. Y. 742 ; *Matter of Keleman*, 126 N. Y. 73 (80). But instead of adopting this method, an owner sometimes makes a transfer which is absolute only on its face, and couples it with a direction, or agreement, or understanding, intended to be morally binding on the transferee, that he will carry out the intended purpose, which would be illegal if expressed in the will, *e.g.*, that he will select beneficiaries from an indicated but indefinite class, and give the property to them. This scheme is in a sense an attempted express trust. The trust is expressed, but the expression of it is kept secret. Such a scheme is invalid. It would involve a fraud on the part of the transferee either to carry out the plan, or to refuse. If he carried it out, it would be a fraud on the law ; if he failed to do so, a fraud on the transferor. Accordingly, he is held to be a trustee *ex maleficio* for the grantor or those who would succeed to the beneficial rights of enjoyment if the attempted disposition is ineffective. "Equity acts in such a case not because of a trust declared by the testator, but because of the fraud of the legatee." *Matter of O'Hara*, 95 N. Y. 403 (413). A similar question is presented where the instrument of transfer itself uses expressions which may, or may not, as a matter of construction, attempt to impose an obligation on the trans-

feree to carry out an illegal purpose. If they do, the trust is express, and invalid. *Matter of Ingersoll*, 131 N. Y. 573; *Willets* v. *Willets*, 20 Abb. N. C. 471, aff'd 103 N. Y. 650. If they do not, then the transfer is absolute and valid on its face, and the question still remains whether there is any secret trust behind it. Transfers upon a secret trust are usually effected by will. The principles of construction, where it is doubtful whether the devise or bequest is or is not intended on its face to be absolute, are the same that govern any similar expressions in instruments referring to desires legal or illegal, and have already been discussed under the head of precatory trusts, *ante*, § 36 *g*.

If it is claimed that a devise or bequest is given in trust, either by virtue of some testamentary expression of desire, or by virtue of extrinsic facts, and whether or not the trust, if attempted, would be illegal, then the question whether it is in reality absolute or in trust may be presented in various forms:

(*a*) As a question of mere "construction" of the instrument itself. In this form it may arise either in the Surrogate's Court or in a suit in equity. And it must be decided by the evidence admissible upon such an issue.

(*b*) On proceedings for probate, if the validity of the will is attacked on the ground of fraud or undue influence, arising out of the alleged gift, here, and on this issue, extrinsic evidence is admitted for that purpose, on the question of the validity of the will. But to establish a trust *ex maleficio*, a separate action must be maintained in equity. That result cannot be accomplished in the Surrogate's Court.

(*c*) As a question of fact, on allegations of fraud, on the ground that the gift, vested by the will in the legatee or devisee, was the product of a fraud upon the testator, or upon the law. In this form, and for the purpose of establishing a trust *ex maleficio*, it can only be raised in a court of equity, and extrinsic evidence of intent is then admissible to establish the alleged fraud.

The first of these classes is illustrated in *Matter of Keleman*, 126 N. Y. 73, where, on a question of construction, such a gift was held absolute and valid. The second and third are illustrated in the two *O'Hara* cases, heard together (95 N. Y. 403), in one of which, extrinsic evidence being admissible, equity found fraud and established a trust *ex maleficio* and nullified the gift. *Matter*

of Keleman, 126 N. Y. 73 explaining *Matter of O'Hara*, 95 N. Y. 403.

(*d*) By a suit in equity brought by those claiming under the alleged trusts, seeking to restrain the trustees from disposing of the property in a manner contrary to the directions given by the testator. *Trustees* v. *Ritch*, 91 Hun, 509, where there was a testamentary gift to executors, absolute on its face, coupled with private directions to them to pay it to certain educational institutions. The result of sustaining the disposition as a valid trust would be to effect a transfer of more than half testator's property to educational institutions (see L. 1860, ch. 360). At general term, it was held that this latter objection could not be made (save by the State in certain cases) unless the contestant, if successful, would benefit by the result, and that the right to thus contest may, after testator's death, and for a valuable consideration, be waived. With this case compare *Rich* v. *Tiffany*, 2 App. Div. 25 (27) ; *Stephenson* v. *Short*, 92 N. Y. 433 (441) ; *Harris* v. *Slaght*, 46 Barb. R. 470 ; see *sub nom. Harris* v. *Am. Bible Soc'y*, 2 Abb. Ct. App. Dec. 316 ; *McKeown* v. *Officer*, 6 N. Y. Supp. 201 ; 127 N. Y. 687.

Where the testamentary disposition is absolute on its face, but is coupled with an antecedent agreement that the property shall be used for a purpose which would be illegal if set forth in the will, a distinction has recently been raised, but as it has not yet been passed on by the Court of Appeals, it will here be merely stated, without discussion. This suggested distinction is as follows : (1) If the *end to be attained* by the secret trust is something which the law condemns *per se*, irrespective of the method of accomplishing it, *e.g.*, the creation of a trust for indefinite beneficiaries, then the principles already stated apply, as in *Matter of O'Hara*, 95 N. Y. 403 ; save that in cases where the condemnation of the law is based solely on the theory of protecting the interests of certain parties, *e.g.*, the wife or children of the testator, they may, if competent, waive their right to object, and thereupon the legal condemnation disappears, along with the reason for it. See *Trustees* v. *Ritch*, 91 Hun, 509. (2) But where what the law objects to is not the end sought, but merely the doing of certain things *by means of a will*, then, it is said, it might not seem so clear that a secret trust for such an end

would be objectionable.[1] For example, under the statute, L. 1860, ch. 360, § 1, providing that no person having a husband, wife, child, or parent, shall, *by his or her last will and testament*, devise or bequeath to any benevolent, etc., society, etc., more than half his or her estate, or under L. 1848, ch. 319, § 6, relating to benevolent, etc., societies, and providing that *no devise* or *bequest* to them shall be valid unless the *will* shall have been made at least two months before testator's death, it may be the purpose to confine the provisions to wills. A person may give all his property absolutely to such corporations, during his life, even though he is at the point of death, and if it is his free and intelligent act, the law raises no objection. The question is, therefore, whether or not an agreement between an owner of property and another, that if the former should leave property to the latter by a will absolute on its face, the latter would give it all to such a corporation, would be valid. The statute does not, on a literal reading of its terms, object to the end, but to the method of accomplishng it by will. The question is, whether such an arrangement would in fact be a disposition by will. For a discussion of this point, see *Trustees* v. *Ritch*, 10 Misc. 503 (531 *et seq.*), aff'd, 91 Hun, 509, where, however, the case turned on the point (as to which compare *Rich* v. *Tiffany*, 2 App. Div. 25, and cases there cited) that the statutes involved were intended solely for the benefit of the wife, etc., and that the right to object had been waived. Compare also *Hoyt* v. *Cross*, 108 N. Y. 76 (80).[2]

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[1] To the point that such a trust is not "testamentary;" that it is not to be found in the will; that it is raised by matters *dehors* the will; see *Matter of O'Hara*, 95 N. Y. 403; *In re Boyse*, L. R. 26 Ch. D. 531; *In re King's Estate*, L. R. 21 Ir. 273; *Cullen* v. *Att'y-General*, 1 Eng. & Ir. App. 190, aff'g 14 Ir. C. L. R. 137; *Olliffe* v. *Wells*, 130 Mass. 221; *Hoge* v. *Hoge*, 1 Watts, 163; *Church* v. *Ruland*, 64 Pa. St. 442; *Matter of Keleman*, 126 N. Y. 73.

[2] There is another class of cases, which are analogous to the secret trusts above discussed in that while the attempted devolution of property appears, on the face of things, to be absolute and beneficial, there is in reality an agreement or arrangement that the property shall be held in trust; but which differ from those discussed above in that the trust thus attempted is one which would have been valid even if expressed in the instrument of transfer. Such cases exist

(*a*) Where one who proposes to make a given testamentary disposition, is dissuaded by the assurance of the heir or next of kin that in the event of in-

(7) *Seventh Group.*

§ 522. **Void as to third parties.**—A trust valid in all respects as to the parties thereto and their representatives, may be void as to third parties, *e.g.*, as in fraud of creditors. That subject is fully discussed in Bishop on Insolvent Debtors, and in the books on Fraudulent Conveyances. See also *post*, Chapter XXV.

(8) *Devolution of Title.*

§ 523.—Whatever the ground on which an attempted trust fails, the result is never to leave the title in the trustee, free of the trust. But see *ante*, § 519. *Forster* v. *Winfield*, 142 N. Y. 327 (333); *Wright* v. *Douglass*, 7 N. Y. 564 (570, 574); *Brewer* v. *Brewer*, 11 Hun, 147, aff'd *sub nom. Bremer* v. *Penniman*, 72 N. Y. 603; *Clapp* v. *Byrnes*, 3 App. Div. 284; *Gross* v. *Moore*, 68 Hun, 412, aff'd 141 N. Y. 559. (*a*) If the disposition is void on its face, the title remains in the grantor or passes

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testacy the latter will carry out the proposed disposition. *Williams* v. *Fitch*, 18 N. Y. 546; or

(*b*) Where one who, having made a testamentary disposition in favor of A absolutely, is about to change it, is dissuaded by the assurance of the devisee or legatee already named that in case of no alteration he will employ the devise or legacy to carry out the new proposed plan. *Dowd* v. *Tucker*, 41 Conn. 197; *Buckingham* v. *Clark*, 61 Conn. 204; *Brooke* v. *Chappell*, 34 Wis. 405; or

(*c*) Where one who proposes to make a testamentary disposition, absolute on its face, with the purpose of placing the proposed legatee or devisee under a moral obligation to employ it otherwise than for his own benefit, is encouraged or permitted by the proposed legatee or devisee to carry out the plan, and repose the confidence. *Matter of O'Hara*, 95 N. Y. 403; *Graves* v. *Graves*, 29 N. Y. State Rep. 624; *Hooker* v. *Axford*, 33 Mich. 453.

Where there are several persons to whom the property passes, as tenants in common, under either of the foregoing classes, the application of the principles already stated to any of them who did not personally and actively join in procuring the disposition, but who in reality receive the property solely by virtue of the representations and assurances made by one of their number, and relating to all, has been considered in several cases. *Trustees* v. *Ritch*, 91 Hun, 509; *Tee* v. *Ferris*, 2 K. & J. 357; *Moss* v. *Cooper*, 1 J. & H. 367; *King's Estate*, L. R. 21 Ir. 273; *Hooker* v. *Axford*, 33 Mich. 453; see *Matter of O'Hara*, 95 N. Y. 403. And notice that the point may be discussed by the Court of Appeals in *Trustees* v. *Ritch*, appeal argued in December, 1896. As to the case of the Edson will, involving the same point, and decided by the Appellate Division in November, 1896, not yet reported, see Appendix.

absolutely to the heirs or the alternative or residuary devisees of the testator, entirely unaffected by the attempted disposition ; as illustrated in the cases considered *ante*, §§ 517, 520 *a*, *b*, *c*, *d*, *e* ; *Cruikshank* v. *Home for the Friendless*, 113 N. Y. 337 (353) ; *Heermans* v. *Burt*, 78 N. Y. 259 (264) ; *Heermans* v. *Robertson*, 64 N. Y. 332 ; *Hawley* v. *James*, 16 Wend. 61 (134, 180, 267). It is true that in *O'Conner* v. *Gifford*, 117 N. Y. 275 (281), where a bequest of money was held void because given to an executor in trust, naming no living beneficiary, the court said that " property which is given to trustees by a will upon a void trust, or one which cannot be executed, is held by them for those persons to whom the law or the other provisions of the will give property which is undisposed of." Of course, if they get possession of it they " hold it " for those who ought to have it, and this is evidently all that was intended by the words quoted, for the court cite as authority the opinions in *Hawley* v. *James*, *supra*, holding that in the case of a trust void on its face no title vests even at law in the proposed trustee. In the *O'Conner* case, the " trustee" was the executor, and as such had possession and title to the personal estate, including the money in question, and had expended it under the void trust, and was required to refund. See also as to trusts valid *inter partes* and void as to third persons, *ante*, § 522 ; (*b*) if the disposition is void, but not on its face, the title vests in the grantee or devisee named, but he will be held, in the proper court, and in appropriate proceedings, as a constructive trustee for those who are beneficially entitled, and will be compelled to convey to them, *ante*, § 521 ; (*c*) if it fails to create a valid trust, but may take effect under the statute as a valid power, the title does not pass to the trustee, but vests directly, under the operation of the statute, in those who would otherwise take it, but it is subject to the power, *ante*, § 517 ; (*d*) if it fails because the duties imposed are passive, or the proposed beneficiary is by the terms of the instrument entitled to the possession and the rents, the title does not pass to the trustee, but vests directly in the proposed beneficiaries, *ante*, § 518. The foregoing principles are established by the authorities cited in connection with the several classes of attempted trusts discussed *supra*.

If the attempted trust is testamentary, and is one where, under

the principles already explained, the statute vests the title either in the heirs or devisees (and not in the proposed beneficiaries), either absolutely or subject to a power, as the case may be, then the question of whether it is the heirs or the devisees who are to thus take the title depends on the following principle. If the will provides, expressly or by implication, for the contingency which has happened, and, by a sufficient residuary devise or otherwise, directs where the title shall go if the trust fails, then this direction governs. But if there is no such alternative disposition, then the title vests in the heirs or next of kin. *Benedict* v. *Webb*, 98 N. Y. 460 (466); *Gross* v. *Moore*, 68 Hun, 412, aff'd 141 N. Y. 559. Compare *Tucker* v. *Tucker*, 5 N. Y. 408 (420). A general and sweeping residuary clause carries everything not before effectually disposed of. "Such is the general rule, and we should not, by engrafting exceptions upon it, or by subtile refinements and distinctions, render the construction of wills difficult and uncertain, and the rule should have full effect unless the testator by the language he uses manifests a plain intention to curtail its operation. The expectations of a testator and his intentions may be two different things. He never expects that any of the dispositions of his will are void, and he rarely expects that any of the devises and bequests will lapse. But when he attempts to dispose of all the property he may own at his death he never intends to die intestate, and he intends that a general residuary clause shall carry whatever as a matter of fact or of law is not otherwise disposed of." *Smith* v. *Smith*, 141 N. Y. 29 (34); *Cruikshank* v. *Home for the Friendless*, 113 N. Y. 337; *Matter of Crossman*, *Id.* 503; *Matter of Bonnet*, *Id.* 522; *Floyd* v. *Carow*, 88 N. Y. 560; *Riker* v. *Cornwell*, 113 N. Y. 115; *Carter* v. *Board of Education*, 68 Hun, 435, aff'd 144 N. Y. 621; *Lamb* v. *Lamb*, 131 N. Y. 227 (235); *Matter of Miner*, 146 N. Y. 121.

In construing a general residuary clause, the intention to include is presumed, and an intention to exclude must appear from other parts of the will, or the residuary devisee will take. *Lamb* v. *Lamb*, 131 N. Y. 227 (235); *Floyd* v. *Carow*, 88 N. Y. 560; *Riker* v. *Cornwell*, 113 N. Y. 115. But this assumption will not of itself warrant reading into the clause a disposition, on a given contingency, which is not in reality covered by its terms as construed in connection with the entire will. *Howland* v.

Clendenin, 134 N. Y. 305 (308, 310). If the disposition which fails is itself a part of the residuary clause, it does not fall again into the residuum, but is undisposed of, unless some alternative disposition other than the general residuary clause has been provided, or the intent that it shall fall again into the residuum is expressed, *Floyd* v. *Carow*, 88 N. Y. 560 (571); *Robins* v. *McClure*, 100 N. Y. 328. Under the general principles above stated, if the residuary clause creates a valid trust, the trust benefits by the invalidity or lapse of particular dispositions, *Matter of Benson*, 96 N. Y. 499 (509); *Smith* v. *Smith*, 141 N. Y. 29. A provision that in case any of the gifts or devises in a will shall be adjudged void or illegal for any reason, then the property covered by them is given to executors in trust for them to carry out and accomplish the end and objects designed in such void and illegal gifts and devises, is invalid. (This rule appears to be restricted to cases where the purpose or nature of the primary gift is what invalidates it, and where the alternative trust created is of such a character as not to meet and obviate the particular illegality. For though a gift to a corporation to be formed within an indefinite or illegal period would be void, a provision that if it should be so adjudged then testator gave it to trustees on a valid intermediate trust, with direction to pay it over to a described corporation if formed within two designated lives, would be valid. But here it is not the interposition of the trust, but the requirement of incorporation within two lives, that cures the defect.) *Booth* v. *Bapt. Ch.*, 126 N. Y. 215, 244. Where a trust to *manage*, fails as such, but is good as a *power* as to one undivided half, the other half of the land and income going to the heirs, the *power to manage* necessarily covers the entire property, though the *income* of one half simply goes as undisposed of. *Downing* v. *Marshall*, 4 Abb. Ct. App. Dec. 662. Where an attempt is made to create an invalid trust, and "on the termination of the trust" a devise to persons named, in fee, and the trust has no term, no beginning and no end, the result is that the devise in fee takes effect at once. In the case below cited there was a devise for life to A, an invalid trust to mortgage the same land; and a remainder over on the termination of the trust. It was held that the devise took effect at testator's death as a vested remainder subject to the life estate in A. *Weeks* v. *Cornwell*, 104 N. Y. 325 (340).

CHAPTER XII.

TERMINATION AND EXTINCTION OF TRUSTS.

§ 524. **When purpose accomplished or term ended.**— "When the purpose for which an express trust is created ceases, the estate of the trustee shall also cease." Real Prop. L., § 89. *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135 (147); *Parks* v. *Parks*, 9 Pai. Ch. 107 (124); aff'd N. Y. Comm. Adv. Jan. 3, 1843; *Betts* v. *Betts*, 4 Abb. N. C. 317 (385); *Kip* v. *Hirsh*, 103 N. Y. 565; *Nicoll* v. *Walworth*, 4 Den. 385 (388) and cases cited; *Watkins* v. *Reynolds*, 123 N. Y. 211. Thus, the death of a sole beneficiary terminates the trust, *Albrecht* v. *Pell*, 11 Hun, 127 (128); *Provost* v. *Provost*, 70 N. Y. 141, even though the persons whose lives were designated to measure the term of the trust are still living. *Crooke* v. *County of Kings*, 97 N. Y. 421 (435–441); *Bailey* v. *Bailey*, 97 N. Y. 460 (466); *Thebaud* v. *Schermerhorn*, 30 Hun, 332. So a direction to apply rents for a specified period, limits the continuance of the trust to that period, unless the purpose sooner fails. *Manice* v. *Manice*, 43 N. Y. 303 (363). So, although the death, resignation, removal or renunciation, of the trustee does not *per se* destroy the trust, Real Prop. L., §§ 91, 92, L. 1882, ch. 185; Code Civ. Pr., § 2818; *Matter of Robinson*, 37 N. Y. 261, the trust instrument may provide that the trust shall terminate, on the death of the trustee named, *Van Cott* v. *Prentice*, 104 N. Y. 45 (52); *Beekman* v. *Bonsor*, 23 N. Y. 298 (303); *Hawley* v. *James*, 16 Wend. 60 (140); or on the beginning of proceedings by a judgment creditor to reach the interest of the beneficiary, *Bramhall* v. *Ferris*, 14 N. Y. 41; compare *Wieting* v. *Bellinger*, 50 Hun, 324; or other proceedings of a similar nature, *Van Cott* v. *Prentice*, 104 N. Y. 45 (54); or when the beneficiary shall become solvent, *Hull* v. *Hull*, 24 N. Y. 647; or upon a contest of the will by the beneficiary, *Bryant* v. *Thomp-*

son, 59 Hun, 545 ; or upon any "interference" by a beneficiary with the trust provisions, *Van Cott* v. *Prentice*, 104 N. Y. 45 (52) ; *Woodward* v. *James*, 115 N. Y. 346 (though if, in such a case, the beneficiary is an infant, any action taken on his behalf by his guardian does not subvert the trust, *Bryant* v. *Thompson*, 128 N. Y. 426) ; or on the consent of individuals named, *Matter of Vanderbilt*, 20 Hun, 520 ; or on the exercise of a power by the beneficiary to dispose of all the property for the benefit of another, see opinion of Earl, J., in *Crooke* v. *County of Kings*, 97 N. Y., p. 446 *et seq.* ; or on the exercise of power by the trustee to convey to the beneficiary whenever satisfied that he would make prudent use of the property, *McLean* v. *McLean*, 3 Hun, 395, aff'd 62 N. Y. 627 ; or of a power to sell and pay over the proceeds to the beneficiary, *Roberts* v. *Cary*, 84 Hun, 328 (333) ; or at the discretion of the trustee on the happening of specified contingencies, *Marvin* v. *Smith*, 56 Barb. 600 (605), aff'd 46 N. Y. 571 ; see the provisions of the will in *Matter of City of Rochester*, 110 N. Y. 159, at p. 160. The same result is reached where a trustee, empowered to make advances to the beneficiary from the corpus, thus disposes of the entire estate. See *Roosevelt* v. *Roosevelt*, 6 Hun, 31, aff'd "substantially upon the opinion below," 64 N. Y. 651. So where a trustee who is authorized by the trust instrument to consume the entire trust estate for his own benefit, exercised his full power in that respect. *Jones* v. *Newell*, 78 Hun, 290. A trust fails *ab initio* if the sole beneficiary dies during testator's life. *McLean* v. *Freeman*, 70 N. Y. 81 ; *Hatch* v. *Bassett*, 52 N. Y. 359. When a valid trust is shown to have been created, however, one who claims that it has terminated must prove the facts establishing such a result. *Duke of Cumberland* v. *Graves*, 9 Barb. R. 595 (606), 7 N. Y. 305. And where the term of a trust is not defined in express terms, and its primary purpose is the benefit of A, while a beneficial interest of B is subordinate and incidental, the death of B will not be construed to terminate the trust, *Matter of Smith*, 131 N. Y. 239 (246). But in the absence of a clear expression, an intent to extend a trust beyond the term for which it would serve some useful purpose, will not be implied. *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135 (147). Nor does the surrender and cancellation of the deed pending the trust term termi-

nate the trust, *Schutt* v. *Large*, 6 Barb. R. 373 ; nor the fact that, after the due creation of a trust, the rents are in fact received by the grantor, instead of for the benefit of the *cestui que trust*, *Wallace* v. *Berdell*, 97 N. Y. 13 (25) ; nor the fact that the trustee of an infant has paid the fund over to its mother, *Matter of Hobson*, 61 Hun, 504 (513), aff'd 134 N. Y. 575. In one sense, a trust is terminated by the loss of the corpus, particularly where the beneficiary is one of the trustees, and is, with them, guilty of the negligence which caused the loss, and so cannot look to them to make good the fund. *Earle* v. *Earle*, 93 N. Y. 104 (117, 118). As a general proposition, a legacy in trust is subject to abatement like other legacies. *Waters* v. *Collins*, 3 Dem. 374. A trust to sell land for the benefit of creditors, is terminated by a cancellation of the debts. There being no debts, there can be no trust to pay debts. *Selden* v. *Vermilya*, 3 N. Y. 525. Where a will creates a trust, the subsequent birth of a child unprovided for does not necessarily affect the standing of the trust. Thus, a married woman made a will devising a life estate in land. Afterward a child was born. But as the child, at its mother's death, would take only what it would have taken if there had been no will, and as, in that case, its father would have been entitled to curtesy, the child would take nothing until the father died, and in the meantime the provisions of the will would be effective. *Luce* v. *Burchard*, 78 Hun, 537 ; *Smith* v. *Robertson*, 89 N. Y. 555. *Ante*, §§ 299, 520*e*.

§ 525. **Under power of revocation.**—A trust of real or personal property may also be terminated by the exercise by its creator of a power of revocation, but only if the power is reserved in the instrument, Real Prop. L., § 128 ; *post*, Chapter XXIII. ; *Belmont* v. *O'Brien*, 12 N. Y. 394 (404) ; *Rosenburg* v. *Rosenburg*, 40 Hun, 91 ; *Van Cott* v. *Prentice*, 104 N. Y. 45 (52, 54–55) ; *Von Hesse* v. *MacKaye*, 136 N. Y. 114 (see *Garnsey* v. *Mundy*, 24 N. J. Eq. 243 ; *Conkling* v. *Davies*, 14 Abb. N. C. 499) ; even though the creator of the trust be also the trustee, *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135 (137, 142) ; but not if the instrument is silent on the subject. *Culross* v. *Gibbons*, 130 N. Y. 447 (452–453) ; *McPherson* v. *Rollins*, 107 N. Y. 316 ; *Wallace* v. *Berdell*, 97 N. Y. 13 (25).

Where one takes out a policy of insurance on his own life, making the contract expressly "as trustee for A, B," etc., payable on his death to them or their guardians, etc., and pays premiums thereon as trustee, those assured acquire a vested interest in the policy, increasing yearly in value. The trustee might refrain from paying premiums and allow lapse, but the surrender value would belong to those assured. After paying premiums he cannot cut them off by changing the name of the assured and making it payable to another. It is not revocable, save by lapse, and even then not as to surrender value. It is in part executed, and so irrevocable. *Garner* v. *G. L. I. Co.*, 110 N. Y. 266. The mere fact that the creator, in creating the trust, did not know that it was irrevocable, was held, in *Fellows* v. *Heermans*, 4 Lans. 230 (241), to constitute a mistake of law, and to be insufficient to sustain a suit to set aside a trust deed. Compare *Conkling* v. *Davies*, 14 Abb. N. C. 499. But in *Barnard* v. *Gantz*, 140 N. Y. 249, it was held that though a trust deed contains no power of revocation, yet if the situation and relation of the parties throws the burden on the trustees of showing the fairness and validity of the transaction, it may, in the absence of evidence to show that its terms were actually understood and intended, be reformed in equity so as to include a power of revocation, or if, in such a case, the creator executed a revocation and then died, effect may be given to that revocation as if a power to revoke had been present in the original instrument In that case there was, however, some affirmative evidence that the creator of the trust did not understand its irrevocable nature. Delivery of an instrument revoking a trust deed is not essential to its validity as between the parties, where there is no question of the validity of the acts of the trustees with respect to the property, or their good faith in acting under the deed, or the rights of third persons. In the absence of provisions in the trust deed pointing out the method of revocation, it may be revoked as between the parties, as above set forth, by the execution of any instrument so intended and sufficiently expressing that intention. *Barnard* v. *Gantz*, 140 N. Y. 249 (258), where the trust related to personal property. As to real property, see Real Prop. L., § 273, quoted below in this section. Where a trust is created, valid on its face, and is coupled with a power of revocation reserved, the court

will not infer a fraudulent intent to create a mere semblance of transfer of title, where an honest explanation is possible. *Von Hesse* v. *MacKaye*, 136 N. Y. 114 (118). Besides a power of revocation, the creator of the trust may reserve a power to modify. *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135 (137, 142). An absolute power of revocation reserved by a grantor for his own benefit renders him still the absolute owner of the land conveyed so far as the rights of creditors and purchasers are concerned. Real Prop. L., §§ 125, 231. And the same rule is applied to personalty. See authorities cited in note in 14 Abb. N. C. p. 501 ; *Von Hesse* v. *MacKaye*, 136 N. Y. 114.

" A power of attorney or *other instrument*, recorded pursuant to this article (Art. VIII. of the Real Property Law, " Recording Instruments affecting Real Property") is not deemed revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also recorded in the same office in which the instrument containing the power was recorded." Real Prop. L., § 273.

§ 526. **Power of court.**—Except by failure of the trust purpose, or the lapse of time or happening of a condition provided for by the trust instrument, or the exercise of a valid power of revocation, or, in certain cases (where the beneficiary's interest is alienable), by the consent of the beneficiary, all express trusts valid in their creation are by statute indestructible. *Cuthbert* v. *Chauvet*, 136 N. Y. 326 (331). The court has no power to destroy an existing trust. *Douglas* v. *Cruger*, 80 N. Y. 15 ; *Lent* v. *Howard*, 89 N. Y. 169 ; *Cuthbert* v. *Chauvet*, 136 N. Y. 326 (332) ; *Matter of Vanderbilt*, 20 Hun, 520 (524, 525). And the trustee of an express trust cannot be compelled by the court, in an action or proceeding, to enter into a stipulation for judgment adjudging the trust void. The court cannot compel the trustee to consent to a destruction of the trust. *Cuthbert* v. *Chauvet*, 136 N. Y. 326 (327, 329). The fact that the apparent existence of a trust has given rise to a large amount of litigation tending to deplete the fund, does not warrant the court in cutting the knot by peremptorily destroying the trust, *Cuthbert* v. *Chauvet*, 136 N. Y. 326 (331) ; nor the fact that all the beneficiaries, and all the heirs, are dissatisfied with the will creating

the trust. *Id.*, p. 329. Even where some of the beneficiaries of an express trust are *infants*, and litigation over the validity of the trust endangers their estate and threatens the loss of the fund for their benefit, which might thus be dissipated, still the court has no power, for that reason, to compel the trustee to enter into a compromise which, by destroying a valid trust, secures that fund for the benefit of the infant—nor even to authorize such a compromise. As to whether it could do so, in such a case, if the infants *alone* were concerned, *quære*, but it would appear not, though the court of equity possesses large discretionary power for the protection of the property of infants as its wards. *Id.*, 332–333. The power of equity tribunals, though exercising a supervisory power over the management of trust estates and the conduct of trustees, has never been exerted to dissolve a trust, pending its term, save in certain exceptional cases, as: 1. Where the trust had become impossible of performance, through the occurrence of unforeseen situations; 2. Marriage settlements where the marital relation had been annulled; 3. On the application of all interest parties, where the whole design and object of the trust scheme had been practically accomplished and all the interests created by it had become vested. But in none of these cases was the plan of the trust defeated, or the trust fund diverted from its original purpose by the action of the court. No trust was ever strangled in its infancy by judicial coercion. *Id.*, p. 328. But whether any remnant of the former limited power of a court of equity to terminate a valid existing trust in certain special cases still exists at all, *quære*. *Id.*, p. 329. Compare *post*, § 527; Dom. Rel. L., § 29. And where discretion is reposed solely in the trustees to terminate the trust in certain contingencies, it cannot be exercised by the court. *McLean* v. *McLean*, 3 Hun, 395, aff'd 62 N. Y. 627; *Matter of Vanderbilt*, 20 Hun, 520; *Hull* v. *Hull*, 24 N. Y. 647.

§ 527. **Trusts for married women.**—"Any person who may hold or who may hereafter hold as trustee for any married women, any real or personal estate or other property under any deed of conveyance or otherwise, on the written request of such married women accompanied by a certificate of a justice of the Supreme Court that he has examined the condition and situation

of the property, and made due inquiry into the capacity of such married women to manage and control the same, may convey to such married women by deed or otherwise, all or any portion of such property, or the rents, issues or profits thereof, for her sole and separate use and benefit." L. 1849, ch. 375, § 2. (Repealed, 1896, by the Domestic Relations Law, and re-enacted with minor changes of phraseology, as of October 1st, 1896, as § 29 thereof, omitting the last eight words.) The question whether this statute applies to express trusts, or merely to passive trusts, is involved in much confusion. The authorities on this point are as follows :

Douglas v. *Cruger*, 80 N. Y. 15. (1880.) Here an ante-nuptial settlement was executed in 1837, by which the man agreed to convey to a trustee the interest in all the real estate of the woman, to which he might become entitled on the marriage, in trust to receive and apply the rents and profits to her use during their joint lives, and on her death before him, remainder to her children, etc. After the marriage a trust deed was duly executed. In 1848, on a certificate and order of a justice of the Supreme Court, the trustee conveyed the property to the wife. The court say, p. 19, that "there was nothing in that act [of 1848] conferring such authority [on the court]. In the act on the same subject passed in 1849 [chap. 375, of the Laws of that year], *there was a provision conferring such authority* upon a justice of the Supreme Court ;" but that this later act cannot validate the prior conveyance. So far as concerns the act of 1849, this is a mere dictum. Compare *Wood* v. *Wood*, 83 N. Y. 575.

Thebaud v. *Schermerhorn*, 30 Hun, 332. (1883.) Here the ante-nuptial settlement involved a conveyance, by the woman, of her property to trustees, on a trust similar to that in the *Cruger* case, with a power of testamentary appointment in her and an alternative disposition in case of default. The husband died, and the woman married again. In March, 1872, she procured a certificate under the act of 1849, and the trustee conveyed to her in fee. It was held that the case was within the provisions of the act.

Matter of Brewer, 43 Hun, 597. (1887.) Here the trust had been created by a third person, to receive and apply the rents to the use of a married woman for her life. It was held

that "even if the statute should be held to include a trust of this description," the statute left it optional with the trustee whether or not to convey, even after a certificate had been procured.

Genet v. *Hunt,* 113 N. Y. 158. (1889.) Here the terms of the trust were similar to those in the *Thebaud* case. The wife died before the husband, leaving a will which by its own terms suspended the absolute power of alienation of the same property covered by the trust deed, for two lives, thus effecting a total suspension during three lives counting from the beginning of the estate in the original trustees. It was claimed that the effect of the statute of 1849 was to obviate any suspension during the life of the testatrix, under the trust deed, in that there were persons in being, namely, the beneficiary and the trustees, who, if they chose to, and could, procure a certificate from a justice, could then free the estate from the trust. The court say, p. 172, that "assuming that the trust in this case was within the statute of 1849," the disability is only conditionally removed, the condition being the judicial action of the justice. It is only a power dependent on the consent of the judge. "Until such consent is obtained, the suspension continues." "But, independently of this consideration, we think the statute was intended to apply merely to nominal trusts to secure a married woman in the enjoyment of her separate estate, where this was the sole object of the trust." The point is there elaborated at some length. Two judges dissented, though on another ground, and the chief judge did not vote. Even as a *dictum*, the remark is based also on another ground mentioned in the opinion, namely, that future contingent estates were limited on the wife's interest, to take effect on her death during coverture, unless defeated by her appointment by will, and thus, under a conveyance to her by the trustees, the property would not be held "for her sole and separate benefit." As to this point, it would seem that the life estate in the trustees, which was all they had to convey, might be held by her for her sole and separate benefit. As to the point that the statute applies only to nominal trusts, the trustee holding merely the legal and the beneficiary the equitable title, it appears that there are no such trusts, and that none could have been created since 1830. In that view, the act of 1849 must be looked on as applying only to such nominal trusts for married women,

as were created prior to 1830, and even as to that point, see Real Prop. L., §§ 70, 72, 73. In any event, in the *Genet* case no certificate had been issued by a justice, and therefore the bearing of the act of 1849 was not in issue.

§ 528 **Release by beneficiary.**—Prior to 1893, the fact that the beneficiary was also entitled to the remainder limited on the trust estate, had no bearing whatever upon his right to assign or otherwise dispose of his interest. As beneficiary, and as remainderman, he occupied two distinct capacities. Under the former he had no title, legal or equitable, but a mere right to enforce the trust in equity. Under the latter, he was vested with the legal and equitable title. There was no merger. *Asche* v. *Asche*, 113 N. Y. 232 ; *Greer* v. *Chester*, 62 Hun, 329, aff'd 131 N. Y. 629 ; *Raymond* v. *Rochester Trust &c. Co.*, 75 Hun, 239 ; *Matter of Lewis*, 3 Misc. 164. But in 1893 a remarkable change in the policy of the law was embodied in an Act (L. 1893, ch. 452) amending 1 R. S. 730, § 63, relating to assignments of beneficial interests. This has since been succeeded in turn by § 83 of the Real Property Law, which went into effect October 1st, 1896, and which provides that " . . . whenever a beneficiary in a trust for the receipt of the rents and profits of real property is entitled to a remainder in the whole or a part of the principal fund so held in trust subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such rents and profits, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder." It is to be noticed that while this section is substituted, in the Real Property Law, for its predecessor, 1 R. S. 730, § 63, as amended by L. 1893, ch. 452, yet neither the Act of 1893 by itself, nor § 63 which it amended, has been in terms repealed. Indeed, § 63 is specifically saved from repeal, by the express terms of the " Schedule of Laws Repealed," at the end of the Real Property Law, which repeals all of Chap. 1, Title II., containing that section, " except § 63." The purpose of having two explicit and different provisions on the same subject is obscure. The theory may be that the new section relates solely to real property, and repeals *pro tanto* and

by implication the prior section, which also applied directly to real property only, but had been applied to personal property by way of analogy. The new section appears on its face to contemplate a retroactive effect on existing trusts. (But see Real Prop. L., § 1.) If so, its purpose is to deprive the trustee of a title vested in him (though in trust), and to break up a scheme framed by the creator of the trust in reliance upon the existing statutes, and to present the property bodily to a person to whom the creator never intended it to pass, at any rate during the trust term. It would appear also that the creator of the trust, or his heirs, or residuary devisees, if a prior valid trust can thus be annulled at all, are vested with a property in the nature of a possibility of reverter in case the trust should be annulled pending its term, and that the effect of the act would be, under the Constitution (Art. 1, §§ 6 and 11), to turn this possibility into a present estate in them for the term of the annulled trust. *Losey* v. *Stanley*, 147 N. Y. 560. Also *Leggett* v. *Hunter*, 19 N. Y. 445, may have some bearing, though in that case the beneficiaries were infants, and the legislation considered simply authorized the sale of land and reinvestment of the proceeds, without in any way interfering with the existing rights or relations of the various parties. Some light upon the question of a legislative intention to make this statute retroactive may be found in the established principle that the first sentence of the section, formerly 1 R. S. 730, § 63, *prohibiting* an assignment by the beneficiary of certain trusts, did not apply to trusts previously existing. *Dyett* v. *C. T. Co.*, 140 N. Y. 54.[1]

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[1] *Void trusts.*—A trust instrument may, of course, be set aside on the ground of fraud, or of undue influence, etc., but this constitutes not a termination of the trust, but a finding that it never existed. *Cuthbert* v. *Chauvet*, 136 N. Y. 326 (330); *Fellows* v. *Heermans*, 4 Lans. 230 (244 *et seq.*). So also, if testator has created a trust in his real estate, a suit may be brought by one who bought land from testator, but who has lost his deed before record. The trustees and beneficiaries under the will being brought in as defendants, and equitable jurisdiction being founded on a prayer for the freeing of plaintiff's title from a cloud, the court may compel the defendants to join in a deed of the land to plaintiff. By so doing, they do not destroy a valid trust, but merely find that testator did not own the land in question, at his death, and so, that it was not in fact covered by the trust created by the will. *Kent* v. *Church of St. Michael*, 136 N. Y. 10. As to whether a conveyance in trust by

a minor, by way of marriage settlement, can be disaffirmed by her during coverture, see *Temple* v. *Hawley*, 1 Sandf. Ch. 153 (168).

Presumption from lapse of time.—There are cases, where the purpose of a trust may be deemed to have been fully accomplished, and the trust terminated, on account of the length of time that has elapsed since its creation, and the absence of any facts indicating its continued existence, *e.g.*, a trust of land to pay debts, created in 1840, where the assignor died in 1870, and the assignee in 1865. and no successor had been appointed, and it did not appear that the assignee had ever asserted any title, or that any creditor of the assignor had made any claim or attempted to enforce the trust, etc., may be presumed in 1880 to have terminated, even apart from Real Prop. L., § 90, providing that in case of trusts for the benefit of creditors, except where a different limitation is contained in the trust instrument, or is especially prescribed by law, the trust shall cease at the end of twenty-five years from its creation, this section being a substitute for 1 R. S. 730, § 67, as amended by L. 1875, ch. 545, which statute, it seems, was retroactive. *Kip* v. *Hirsh*, 103 N. Y. 565 (572); *N. Y. Steam Co.* v. *Stern*, 46 Hun, 206, 3 Law Rep. Annot. 740, note. Compare *Duke of Cumberland* v. *Graves*, 9 Barb. R. 595 (608–609), 7 N. Y. 305; *Hoag* v. *Hoag*, 35 N. Y. 469.

PART II.

CHAPTER XIII.

THE LAW OF POWERS.

§ 529. **The prior law.**—Of the law of powers, as it existed prior to the adoption of the Revised Statutes, the revisers of 1830 say, in their Notes: "The law of powers, as all who have attempted to master it will readily admit, is probably the most intricate labyrinth in all our jurisprudence. Few, in the course of their studies, have been called to enter it, who have not found it difficult to grope their way in its numerous and winding passages. In plain language, it abounds pre-eminently in useless distinctions and refinements, difficult to be understood, and difficult to be applied, by which a subject, in its own nature free from embarrassment, is exceedingly perplexed and darkened. We encounter this darkness at the very threshold of our inquiries, as the division or classification of powers (which appears in the beginning of every elementary work on the subject) seems industriously framed to confound all intelligence of their meaning and utility.

"Nor is it merely because it is mysterious and complex, that a reform in this part of the law is desirable. It is liable to still more serious objections, since, as will appear in the course of our remarks, it affords the ready means of evading the most salutary provisions of our statutes. It avoids all the formalities wisely required in the execution of deeds and wills, frustrates the protection meant to be given to creditors and purchasers, and eludes nearly all the checks by which secrecy and fraud, in the alienation of lands, are sought to be prevented." See also *Coster* v. *Lorillard*, 14 Wend. 265 (323 *et seq.*; 313 *et seq.*); *Downing* v. *Marshall*, 23 N. Y. 366 (378); *Jennings* v. *Conboy*, 73 N. Y.

230 (233). In accordance with the recommendation of the revisers, a new scheme of law was adopted, which went into effect on January 1st, 1830, as a part of the Revised Statutes.

§ 530. **Former powers abolished.**—The Revised Statutes (1 R. S. 732, § 73) provided that "Powers as they now exist by law, are abolished; and from the time this chapter shall be in force, the creation, construction and execution of powers, shall be governed by the provisions of this article" (on Powers). The Real Property Law repeals this provision, and substitutes therefor the following (§ 110): "Powers, as they existed by law on the thirty-first day of December, 1829, have been abolished. Hereafter, the creation, construction and execution of powers, affecting real property, shall be subject to the provisions of this article [on Powers]; but this article does not extend to a simple power of attorney, to convey real property in the name, and for the benefit of the owner."

§ 531. **The Revised Statutes.**—The Article of the Revised Statutes relating to Powers was intended to be a complete and exhaustive codification of the law under which powers were thereafter to be created, governed and construed. *Sweeney* v. *Warren*, 127 N. Y. 426 (433); *Cutting* v. *Cutting*, 86 N. Y. 522 (530); *Hutton* v. *Benkard*, 92 N. Y. 295 (305). And it has been laid down by the courts that "the prior law as to powers is of little use in the investigation of the subject of powers as they are now defined and authorized." *Jennings* v. *Conboy*, 73 N. Y. 230 (233). Nevertheless, it has proved true, in fact, that the codification is not entirely exhaustive, and on points not covered by the statute the courts have frequently sought for light in the prior law, in so far as it was consistent with the scheme of the statute. Thus, it has been held that there was no attempt, in the revision, to enumerate or define the acts which might lawfully be done under a power, and that in that respect the then existing law was subjected to no innovation. The statute, it is true, enunciates a code on the subject of powers, but it makes no attempt to enumerate or define the lawful occasion for creating a power. *Downing* v. *Marshall*, 23 N. Y. 366 (379–380). And in *Mutual Life Ins. Co.* v. *Shipman*, 119 N. Y. 324 (328–

329), the court refer to the prior law, and quote from Sugden, Kent and Perry, to show the existence of a principle in the light of which they construe one of the sections of the article on Powers, saying that it had been established long before the enactment of our Revised Statutes, and was in the immediate contemplation of the revisers when they framed the section in question. See also *Barber* v. *Cary*, 11 N. Y. 397 (402). And English decisions and text-books are not infrequently cited on the subject of Powers by our courts. See *Sweeney* v. *Warren*, 127 N. Y. 426 (433); *Darling* v. *Rogers*, 22 Wend. 483 (495–496); and the peculiar case of *Townshend* v. *Frommer*, 125 N. Y. 446 (465). As to the bearing of the Statute of Powers on powers created before its enactment, see *Meakings* v. *Cromwell*, 5 N. Y. 136 (139); *Leavitt* v. *Pell*, 25 N. Y. 474 (478); *Dyett* v. *C. T. Co.*, 140 N. Y. 54, and Real Prop. L., § 1; and compare § 395, *ante*, relating to the corresponding subject in the field of trusts.

§ 532. **Cy-pres.**—The *cy-pres* doctrine of the English courts, which has been applied to the construction of appointments of real estate under powers contained in wills (note to *Alexander* v. *Alexander*, Tud. L. C. on Real Prop., 299), does not prevail in this State. *Hillen* v. *Iselin*, 144 N. Y. 365 (374).

§ 533. **The Real Property Law,** which went into effect on October 1st, 1896, repealed the Article on Powers, and substituted an Article embodying, but rearranging, the same material, with certain omissions and additions, and with numerous changes in phraseology.

CHAPTER XIV.

POWERS DEFINED AND CLASSIFIED.

§ 534. **Power defined.**—" A power is an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power, might himself lawfully perform." Real Property L., § 111.[1]

§ 535. **Power distinguished from trust.**—An express trust necessarily requires title, in the trustee, to the property in question, which may or may not be in fee, according to the nature of the trust. A power does not require any title to the property affected by the power to vest in the person who is to exercise it. It is consistent with the existence of a power that the donee thereof may have a title in the property affected, but this is not requisite ; while if the donee of the power be also the absolute and beneficial owner in fee, the power is merged, and disappears. What title in the donee of the power is consistent and what inconsistent with the existence of given powers, will be considered later. *Post*, § 561 *et seq.* An express trust and a power in trust may co-exist in the same person. *Belmont* v. *O'Brien*, 12 N. Y. 394 (404). *Post*, § 618.

§ 536. **Distinguished from power of attorney.**—The provisions of the article on Powers, do " not extend to a simple power of attorney, to convey real property in the name, and for the benefit of the owner." Real Prop. L., 110. For illustrations

[1] Though a power is only effective in so far as the same act could have been performed by the donor, yet even if the donor and grantor (*e.g.*, as being a receiver) had no power to do the acts in question, still if all the persons beneficially interested in the grant by him and the execution of the power unite in approving the grant and the power, this would render the execution of the power effectual. *Semble*, *Woerz* v. *Rademacher*, 120 N. Y. 62 (68).

of the distinction, see *Weber* v. *Bridgman*, 113 N. Y. 600; *Watt* v. *Watt*, 2 Barb. Ch. 371; *Heermans* v. *Robertson*, 64 N. Y. 332 (340); *Hetzel* v. *Barber*, 69 N. Y. 1 (13); *Hyatt* v. *Clark*, 118 N. Y. 563; *Terwilliger* v. *Ontario C. & S. R. R. Co.*, 149 N. Y. 86; *Lingke* v. *Wilkinson*, 57 N. Y. 445; *Craighead* v. *Peterson*, 72 N. Y. 279; *Fellows* v. *Heermans*, 4 Lans. 230 (234); *Cumming* v. *Williamson*, 1 Sandf. Ch. 17; *Ramsey* v. *Wandell*, 32 Hun, 482 (484); *Kingsland* v. *Chetwood*, 39 Hun, 602; *Bergen* v. *Bennett*, 1 Cai. Cas. 1; *Hunt* v. *Rousmanier*, 8 Wheat. 174.

§ 537. **Power distinguished from charge.**—A mere charge of debts, or legacies, on land, does not by itself alone confer any power on the executor to sell. The title vests in the heirs or devisees, and the creditors or legatees may enforce the charge by suit. *Dill* v. *Wisner*, 88 N. Y. 153 (159), and see *post*, § 600 *et seq.*

§ 538. **Grantor and grantee defined.**—"The word 'grantor' is used in this article [on Powers], in connection with a power, as designating the person by whom a power is created, whether by grant or by devise; and the word 'grantee' is so used as designating the person in whom the power is vested, whether by grant, devise or reservation." Real Property L., § 112.

Under the law prior to the Revised Statutes, the terms "donor" and "donee" were used. These terms possessed an obvious advantage over those adopted by the revisers, in that they were, so far as applied to real property, free from the confusion arising from the use of the same term to indicate different things. Under the revision, and the present statutes, the grantee of the title, subject to a power, and the donee of the power over it, and the grantee under the power, are all termed grantees. A further confusion in terms arises from the fact that one who *creates* a power, whether by deed or will, is the grantor thereof (Real Prop. L., § 112; 120), but if the power itself is confined to a disposition by "grant," the person to whom the power is given can in general exercise it only by will, and not by conveyance. (*Id.*, § 148.) The old and familiar terms are still some-

times used by the courts (see *Whitlock* v. *Washburn*, 62 Hun, 369, 371), and are generally employed in the succeeding chapters.

§ 539. **Coupled with an interest.**—The donee's power may or may not be "coupled with an interest;" where the donee of a power to sell land, is given any or all of the proceeds, either beneficially or in trust, the power is coupled with an interest. *Holly* v. *Hirsch*, 135 N. Y. 590; *Lahey* v. *Kortright*, 132 N. Y. 450. As to the term "coupled with an interest" as applied to powers of attorney, see *Hunt* v. *Rousmanier*, 8 Wheat. 174. If the interest is in the donee as trustee, the power is also said to be "coupled with a trust." *Lahey* v. *Kortright*, 132 N. Y. 450 (456).

§ 540. **Division of powers—Revisers' note.**—Referring to the division of powers under the common law, the revisers of 1830, in their Report, say:

"The present division of powers is into powers: 1. Appendant or appurtenant. 2. Collateral or in gross. 3. Simply collateral. These cabalistic terms, we are aware, must sound like an unknown tongue to unpractised ears; but our objection is not to the strange phraseology in which this division is expressed; but to the principle on which it is founded. To understand this, the terms must be explained. Powers appendant and in gross, agree in the circumstance that they are both vested in a person having an estate in the lands over which the power is to be exercised. The distinction between them is this: The power is said to be appendant, when it enables the party to create an estate which must attach, in whole or in part, on his own interest. As where a power is given to a tenant for life, to make leases in possession; every lease he executes must, to some extent, take effect out of his own estate. A power is in gross, when it does not attach on the interest of the party, but enables him to create an estate independent of his own, as a power to a tenant for life, to dispose of the reversion. A power is simply collateral, when it is vested in a stranger having no estate or interest in the land.

"It is a striking error in this classification, that it overlooks entirely the nature and objects of the power itself, and regards solely the connection between the party exercising the power,

and the lands which it embraces. Yet it is obvious that the character, and consequently the construction and execution of the power, may be the same, whether it is vested in an owner or a stranger, or is to take effect out of a present or a future estate. Were this merely a logical mistake, it would scarcely deserve attention ; but in fact, it has had an important influence on the law of powers, in all its branches. It is from this arbitrary classification, that rules equally arbitrary have been derived ; rules which are first established at common law, and then by an ordinary process, evaded in chancery, through the medium of refinements, reaching circuitously that equity which ought never to have been disregarded.

"We propose, therefore, an entirely new division of powers, not merely as expressed in terms which at once suggest the reason of their adoption, but because it rests on substantial and practical distinctions. In order to classify powers, we look to their extent, and to the objects which they are meant to attain, since it is from the differences that subsist between them in these respects, that the different rules by which they are governed, are and must be derived. The most important circumstance evidently is, whether the power is to be exercised by the party for his own benefit, or the benefit of others, whether it is an interest or a trust ; and it is to this distinction that the regulations we propose have a principal regard."

§ 541. General classification.—Powers are now classified from two distinct points of view. For when considered with reference to the degree of control given over alienation of property, every power is either general or special ; and when considered with reference to the persons interested in its execution, every power is either beneficial or in trust. Real Prop. L., §§ 113–118.

§ 542. "General" defined.—"A power is general, where it authorizes the transfer or encumbrance of a fee, by either a conveyance or a will of or a charge on the property embraced in the power, to any grantee whatever." Real Prop. L., § 114. To render a power general, it is not necessary that the grantee should be authorized to exercise it through each and all of the methods

designated in the statute. Thus, a power to devise in fee to any person whatever, is *general*, *Hume* v. *Randall*, 141 N. Y. 499 (503), but it is not *absolute* because it can be exercised by will only. *Genet* v. *Hunt*, 113 N. Y. 158 (170); though in certain cases such a power, combined with other features, is by a subsequent section (see *post*, § 567) rendered absolute, and gives the grantee of the power an absolute beneficial estate in fee. Though a power may be in terms limited, it may be construed as general, and *vice versa*, if the intent appear. Note 2, 8 Pai. Ch. p. 124; and cases cited. *Landon* v. *Walmuth*, 76 Hun, 271. And a power to convey a fee by deed, to any person whatever, is also *general*. *Kinnier* v. *Rogers*, 42 N. Y. 531 (534).

§ 543. **"Special" defined.**—"A power is special where either: 1. The persons or class of persons to whom the disposition of the property under the power is to be made are designated; or 2. The power authorizes the transfer or encumbrance, by a conveyance, will or charge, of any estate less than a fee." Real Prop. L., § 115. The second subdivision of this section would appear to refer to powers which were *confined* to alienation of an estate or interest less than a fee. But in *Leggett* v. *Perkins*, 2 N. Y. 297 (317), it is construed to cover powers authorizing such an alienation, even though not thus confined, and it is there stated that a power to convey a fee *or* a less estate is *both* general *and* special, because it answers, literally, to the definition of each.

§ 544. **Beneficial power defined.**—"A general or special power is beneficial, where no person, other than the grantee, has, by the term of its creation, any interest in its execution. A beneficial power, general or special, other than one of those specified and defined in this article [on Powers], is void." Real Prop. L., § 116, formerly 1 R. S. 732, § 79. The last sentence formerly constituted a separate section (1 R. S. 733, § 92), and is discussed below. It will be noticed that the first sentence, taken literally, merely defines beneficial powers, and does not provide that all powers, whatever their purpose, shall, if they fall within the terms of the definition, be valid. Later on, in the Article on Powers, certain beneficial powers are specifically authorized,

and still later, under the Revised Statutes, came § 92 (now with certain changes, the second sentence in § 116), which provided that "No beneficial power, general or special, hereafter to be created, other than such as are already *enumerated and defined* in this Article, shall be valid." Under these provisions, it was contended that § 92 restricted valid beneficial powers to those *specifically* enumerated. It was probably on this theory that the court say, in *Matter of McCaffrey*, 50 Hun, 371 (374), that one of the special beneficial powers thus designated (the other being assumed to be obsolete in view of subsequent legislation) is "probably the only special and beneficial power now valid." But this *dictum* rests on an erroneous reading of the statute. The intent was, to define beneficial powers, and to authorize all such as answered to that definition, and then to specifically authorize certain particular powers, the authority to create which would not otherwise, for one reason or another, have existed, or might be doubtful; or to declare the effect that should be produced by certain beneficial powers. In other words, the particular authorization, or construction, of certain specified beneficial powers did not restrict the general field of authorized beneficial powers, and the effect of § 92, prohibiting the creation of beneficial powers other than those *enumerated and defined*, only excluded such as fell within neither the general definition nor the special enumeration. *Cutting* v. *Cutting*, 86 N. Y. 522 (532–535). The Real Property Law now takes the former § 92, changes the words "enumerated and defined" to "specified and defined," and with some recasting of its form, adds it to § 116 defining beneficial powers. A power to alien in fee by means of a will, to any alienee whatever, where no person other than the donee of the power has by the terms of its creation any interest in its execution, is a general beneficial power. *Hume* v. *Randall*, 141 N. Y. 499 (503). It is not necessary, in order to create by deed or will a beneficial power, to provide affirmatively that the donee shall be solely interested in its execution. If it is a valid power, and no person other than the donee is named as interested, that suffices to make it beneficial. *Jennings* v. *Conboy*, 73 N. Y. 230 (235–236). It is also to be noticed that though other persons may, after the creation of such a power, or by virtue of other instruments than that creating it,

become interested in its execution, it is still beneficial, for they are not interested "by the terms of its creation." *Id.*

§ 545. **Power in trust defined.**—"A general power is in trust, where any person or class of persons, other than the grantee of the power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from its execution." Real Prop. L., § 117.

"A special power is in trust, where either,

1. The disposition or charge which it authorizes is limited to be made to a person or class of persons, other than the grantee of the power,[1] or

"2. A person or class of persons, other than the grantee, is designated as entitled to any benefit, from the disposition or charge authorized by the power." Real Prop. L., § 118.

It might appear that as the statute had already declared that powers are either beneficial or in trust, and had defined a beneficial power as one in the execution of which no person other than the grantee has, by the terms of its creation, any interest, it would have sufficed to define a power in trust as one as to which some person other than the grantee *has*, by the terms of its creation, some interest in its execution. Instead of this, the statute makes a separate definition for each of three classes of powers in trust, namely, powers in trust which are general, powers in trust which are special in that the person or class of persons *to whom the disposition* is to be made is designated, and finally powers in trust which are special in that some person or class of persons *entitled to some benefit* from the disposition or charge authorized, is designated. The test, in each case, takes on a special form. Thus, where the power is general—that is, authorizes alienation *in fee*, to *any alienee whatever*, there can of course be no beneficial right in any persons or class to insist on a conveyance to them (compare *post*, § 691 *et seq.* relating to the principle of election); the only possible beneficial interest any one

[1] The words "or entitled to the proceeds or any portion of the proceeds, or other benefit to result from the execution of the power," which were originally at the end of the above subdivision 1, were struck out by chap. 320, Laws of 1830, § 11; and by § 66 of that act it was declared that the section should be construed as if originally passed in the amended form.

other than the donee of the power can have is in some benefit to result from the execution of the power, as, for example, the proceeds, or a share thereof. Accordingly, the test of a trust, in this case, is the existence of a designation, in the trust instrument, of some person or class other than the grantee of the power, thus interested. When special powers are reached, however, it is seen that as they may, but do not necessarily, involve authority to convey to any person whatever, there may be two classes of beneficial interests—those existing in the person or class, if any, to or among whom the disposition must, by the terms of the power, be made, and those existing in the person or class, if any, entitled to any benefit from the disposition or charge authorized, as, for example, in the proceeds. And corresponding tests of the trust character are adopted by the statute in these respective cases. One result to be deduced from these definitions seems to be this: that where a power is special in that it designates a person or class to whom the disposition must be made, without conditions, it is always in trust unless the person thus designated is the donee himself. Upon these various divisions, general, two classes of special, beneficial and three classes of trust powers, all sorts of changes have been rung. For example, powers may be general, and yet not absolute; *Genet* v. *Hunt*, 113 N. Y. 158 (170); general and beneficial, or general and not beneficial, *Coleman* v. *Beach*, 97 N. Y. 545 (558); general, and purely discretionary, and yet in trust, *Id.*; general and absolute and yet not beneficial, *Id.*; general and beneficial, and yet authorizing a devise only, and not a grant, *Cutting* v. *Cutting*, 86 N. Y. 522 (531). There seems to have been some difficulty in finding the proper head, in this scheme of classification, under which to place the case of a power to sell in fee to any person whatever, but for the benefit both of the grantee of the power and of other persons. It would appear to be clear that such a power is a general power in trust; but in *Smith* v. *Bowen*, 35 N. Y. 83 (89), Leonard, J., says that it cannot be executed as a general power in trust, "because the grantee is *one* of the persons *entitled to the benefits* to result from the alienation of the land," but that it may be lawfully executed as a special power in trust of the second class, which applies "when any person or class of persons other than the grantee is designated as entitled to any benefit

from the disposition or charge authorized by the power." But this is a mere *dictum*, occurring in one only of two opinions in the case, and is certainly the result of inadvertence. For this subdivision under which Leonard, J., classes the power in question, purports in terms to state the cases in which powers which are special in any event, shall also be *in trust*. In determining, therefore, whether any given power falls within its terms, the preliminary question is: Is the power special? If not, then the section can have no application. Now, the power under consideration, thus tested, is clearly general and not special. It authorizes a conveyance in fee to any person whatever. Therefore, in proceeding further to determine whether it is beneficial or in trust, it is futile to see whether it falls within a class specifically confined to special powers. Turning, therefore, to the definition of a general power in trust, it is found to fit this case exactly. For in the case supposed, a "person or class of persons, other than the grantee of the power, is designated as entitled to the proceeds or [a] any portion of the proceeds." Thus this section, in express terms, includes general powers where persons other than the grantee of the power are entitled to a part, and only a part of the proceeds, and where, accordingly, the grantee of the power must himself be entitled to the other part —which is the very case in hand.

CHAPTER XV.

THE CREATION OF POWERS.

(1) *Who may Create Powers.*

§ 546. The statute.—" A person is not capable of granting a power, who is not, at the same time, capable of transferring an interest in the property to which the power relates." Real Prop. L., § 119. For the statutes relating to the right to transfer an interest in real property, see *ante*, § 54 *et seq.* Also Real Prop. L., § 3. One who holds the legal title to lands, though not actually occupying, will be considered as constructively in possession, unless they are in the actual hostile occupancy of another under a claim of title, *Bliss* v. *Johnson*, 94 N. Y. 235; and he may accordingly transfer the same to a trustee, or may grant to another a power to convey the same, without infringing on the provision of the Penal Code (§§ 129, 130, 131) forbidding the sale of lands unless the grantor has, by himself or those through whom he claims, been in possession for one year. *Wright* v. *Syracuse, Ontario & N. Y. R. R. Co.*, 92 Hun, 32 (34). See also Real Prop. L., § 225; Code C. P., § 1501; *Chamberlain* v. *Taylor*, 92 N. Y. 348.

(2) *Powers, how Created.*

§ 547. The statutes.—" An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or *power*, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. But this section does not affect the power of a testator in the disposition

of his real property by will ; . . ." Real Prop. L., § 207. For the section in full, see *ante*, §§ 64, 65.

" A power may be granted either :

" 1. By a suitable clause, contained in an instrument sufficient to pass an estate in the real property, to which the power relates ; or

" 2. By a devise contained in a will." Real Prop. L., § 120.

§ 548. **By grant inter vivos.**—Under subdivision 1 of the statute last quoted, the Revised Statutes employed the words " in a conveyance of some estate in the land," etc. ; from which it followed that if a power was to be created by deed, the deed must also pass title to some estate in the lands, to somebody, in order to bring the power into being. *Jennings* v. *Conboy*, 73 N. Y. 230 (234). On this point, and upon the statute as it then stood, a curious question was raised in *Fellows* v. *Heermans*, 4 Lans. 230 (238 *et seq.*), as follows : If an owner of land attempted to create a trust by deed, but the purpose declared was one of those not permitted under the statute of trusts, the result was to be derived from the following provisions : (*a*) The deed passed no title. 1 R. S. 729, § 58, now Real Prop. L., § 79. (*b*) No instrument which did not pass some title to somebody could be effective to create a power under 1 R. S. 735, § 106, *supra*, § 548. (*c*) Nevertheless, the deed in question *did* create a power, for it fell within the section providing that where an express trust should be created for any purpose not enumerated in the statute, yet if it directed or authorized any act which might be lawfully performed under a power, it should be valid as a power in trust," etc. 1 R. S. 729, § 58, now Real Prop. L., § 79. The case cited held the latter section controlling. The result was, according to that reasoning, that where an owner of land desired to create a power over it in another person, while himself retaining title subject to the power, if he devoted his deed solely to a direct creation of this power, it was void ; but if he cast the same purpose in the form of an unauthorized trust, the statute would condemn the trust as such and save it as a power. The same result might be secured by conveying by the same instrument some petty estate, subject to the power. If that were done, it was then allowable to create the power in direct terms.

It was probably to meet this criticism that the terms of the statute were changed to those above quoted.

§ 549. **By will.**—It is to be noticed that this question did not arise in respect to powers created by will. *Jennings* v. *Conboy*, 73 N. Y. 230 (234). The phraseology was not that a power might be granted "by a clause *in* a devise in a will," etc., but that it may be granted "*by* a devise contained in a will," etc., thus using the word devise not as confined to a testamentary devolution of title, but as covering the creation of a power. In the nature of things also, a devolution of title, either to heirs or devisees, results when the will goes into effect. The statute, 2 R. S. 56, § 5, rendering after acquired lands of the testator subject to a general devise, applies also to a case where the legal title is not devised, but the executors are directed (expressly or by implication) to sell all his estate, etc., and dispose of the proceeds. The power attaches to and affects after acquired lands. *Byrnes* v. *Baer*, 86 N. Y. 210. As to wills, see *post*, § 653.

§ 550. **By implication.**[1]—A power need not be created in express terms, but may be implied. *Cahill* v. *Russell*, 140 N. Y. 402; *Matter of Gantert*, 136 N. Y. 106 (109, 110); *Dill* v. *Wisner*, 88 N.Y. 153 (159); *Phillips* v. *Davies*, 92 N.Y. 199; *Matter of Fox*, 52 N. Y. 530; *Van Winkle* v. *Fowler*, 52 Hun, 355; *Morton* v. *Morton*, 8 Barb. R. 18 (20); *Stewart* v. *Hamilton*, 38 Hun, 19; *McCready* v. *Metropolitan Life Ins. Co.*, 83 Hun, 526, aff'd 148 N. Y. 761. Thus, under a will reading as follows: "Until the sale and conveyance of said premises by my executor as hereinafter provided, I give and devise unto my sister the use of the top floor of my house and premises, free of rent," but making no further provision as to a power, the court say: "Formal words are not necessary to create a power, and, to quote the language of Sugden, 'However obscurely in a will the intention may be expressed, yet if it appears that a power of sale was intended, a sale will be supported.' (8th ed., p. 425, § 7.) . . . In determining whether a power of sale was intended, it is important in a doubtful case to ascertain whether

[1] On this subject see also *ante*, §§ 60–62; 146; *post*, 622.

the general scheme of the will seems to require it. Here, if the power does not exist, the legacies must abate to the extent of nearly four fifths of their amount. While a mere deficiency of personal estate for the payment of legacies will not of itself be sufficient to raise a power of sale, yet where words are used fairly expressive of an intent that the executor shall sell, but their import is uncertain or equivocal, the necessity of a sale, in order to give full effect to the will of the testator, may properly be permitted to have great weight in the construction of the instrument ; we therefore think the decision of the learned judge at special term was right in holding that the executor had power to sell, and it is not important to determine whether the power is imperative or not. The executor is seeking to enforce it, and when executed the real property will be converted into personalty, and thus rendered available for the general purposes of administration, including the payment of debts and legacies. (*Erwin* v. *Loper*, 43 N. Y. 521 ; *Hood* v. *Hood*, 85 *Id.* 561 ; *Glacius* v. *Fogel*, 88 *Id.* 434 ; *Matter of Powers*, 124 *Id.* 361 ; *Matter of Gantert*, 136 *Id.* 106.)" *Cahill* v. *Russell*, 140 N. Y. 402. So the devise of certain land to A, and on A's death "the remainder thereof, if any," to B, gives B a contingent remainder, and A takes a life estate with power of sale. If A had no such power, there could be no question but that all the land would be remaining at A's death. But A was evidently given the right to use up the land, and this could only be done by selling it (or mortgaging it). The vendee, or the purchaser on foreclosure under a mortgage, would take a good title. *Leggett* v. *Firth*, 132 N. Y. 7. A power to lease, though not given in express terms, may be implied, where any other construction would lead to absurd or impracticable consequences. *Starr* v. *Starr*, 132 N. Y. 154. Power in a life tenant of personal property to dispose of it by will, may be implied from a prohibition against any disposition during her life, and the absence of any gift of the remainder. *McLoskey* v. *Reid*, 4 Bradf. 334 (342). A power in the executor to rent implies power to receive rents. *Morse* v. *Morse*, 85 N. Y. 53 (59). Power to apply rents implies power to receive them. *Vernon* v. *Vernon*, 53 N. Y. 351. Power to sell if given to a life tenant for her own benefit does not imply payment, during her life, of a legacy

given to A in general terms. *Steinele* v. *Oechsler*, 5 Redf. 312. Inartificial and inexact language will suffice to create a power, if the intent appear clearly. *Lesser* v. *Lesser*, 11 Misc. 223. See also *ante*, §§ 60–62, 146, 622. But where property is first devised and bequeathed absolutely to A, and an "expectation and desire" is then expressed as to the disposition by A's will, in favor of B, of any part thereof that may be left at A's death, the words of expectation do not constitute a power in trust in favor of B. *Matter of Gardner*, 140 N. Y. 122 (128). Compare *ante*, §§ 36 *g*, 521. So, as the execution of a mere power to sell and convey does not necessarily require for its execution power to insert *covenants* in a deed, such power will not be implied. *Ramsey* v. *Wandell*, 32 Hun, 482 (485). A transfer of all one's property, real and personal, in trust to manage, with power of sale, during the owner's life, for his benefit, presumably is not intended to include such articles as family portraits, or the owner's watch and clothes, etc , over which, accordingly, he reserves ownership and power of disposition. *Hill* v. *Heermans*, 6 Hun, 661. For other cases in which the grounds for implying a power were held insufficient, see *Hobson* v. *Hale*, 95 N. Y. 588 (603); *Alkus* v. *Goettmann*, 60 Hun, 470; *Kelly* v. *Kelly*, 61 N. Y. 47 (50); *Dill* v. *Wisner*, 88 N. Y. 153 (158); *Matter of Fox*, 52 N. Y. 530; *Cahill* v. *Brennan*, 68 Hun, 540, rev'd 140 N. Y. 402. If testator specifically devises designated portions of his realty, or impresses them with separate trusts, the presumption is very strong, and usually controlling, that he did not intend that these dispositions should be overturned by the exercise of a general power of sale. A direction to sell for the payment of debts cannot be *implied* in such cases, because, in order to sustain the structure of the will, there must be implied a direction *not* to sell for such a purpose. But this does not apply where, for instance, the real and personal property is blended in one gift to the executors for a common trust, in which all the beneficiaries share equally. In such cases the exercise of a general and unlimited power of sale is imperative, and may be compelled in favor of any party who is lawfully entitled under the provisions of the will, to the proceeds of the real property when sold, as a creditor, under a general direction to pay debts. *Matter of Gantert*, 136 N. Y. 106 (111); see *Matter of McComb*, 117 N. Y. 378.

§ 551. **By reservation.**—" The grantor in a conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another ; and a power thus reserved, shall be subject to the provisions of this article [on Powers], in the same manner as if granted to another." Real Prop. L., § 124. *Belmont* v. *O'Brien*, 12 N. Y. 394 (404). In *Towler* v. *Towler*, 142 N. Y. 371, an owner of land conveyed it by deed, subject to a life estate thereby reserved to himself, the estate conveyed to vest in possession only at the grantor's death. The conveyance was also subject to a power thereby reserved to the grantor to convey or to devise one third of the land to any wife he might thereafter marry, for her life. He thereafter married, and died without executing the power reserved. For some reason the court cast doubt on the proposition that the power was a power reserved, under the section above quoted ; but assuming that it was so, they hold that although, if the power had been granted to another, his intention to create a power *in trust*, and to make its execution imperative, might have been reasonably inferred from the language and the circumstances, so that equity could have compelled its execution in favor of the wife, yet as he merely reserved it, it must be treated as purely discretionary and not in trust, so that its execution could not be compelled. Three of the judges concurred in the opinion, and three more in the result, while Earl, J., dissented on the ground that the conclusion reached in the opinion nullified the section above quoted. As to imperative and discretionary powers, see *post*, § 581 *et seq.* A power to mortgage, reserved to a married woman, might be duly exercised by a mortgage to secure her husband's debts. *Leavitt* v. *Pell*, 25 N. Y. 474.

§ 552. **By operation of statute.**—Certain attempted trusts are, by operation of the statutes (Real Prop. L., §§ 77, 79), turned into valid powers in trust. This group covers only such attempted express trusts as would have been valid active trusts at common law, as distinguished from passive trusts. *Townshend* v. *Frommer*, 125 N. Y. 446 (456–459). But see below, end of first paragraph of subd. *b*. There are two distinct classes in this group.

(*a*) The first is covered by the following provision : " A devise of real property to an executor or other trustee, for the pur-

pose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him ; but the trust shall be valid as a power, and the real property shall descend to the heirs or pass to the devisees of the testator, subject to the execution of the power." Real Prop. L., § 77. *Konvalinka* v. *Schlegel*, 104 N. Y. 125 ; *Bouton* v. *Thomas*, 46 Hun, 6.

Concerning this statute, the revisers of 1830 say in their Notes : " There is an evident distinction between a trust to sell, created by deed, and a similar trust created by devise. In the first case, as we have before remarked, it is necessary that the trustees should take the estate, or the trust itself might be defeated ; but in the latter, no such necessity exists, and by construing the trust as a power, the interests of those for whose benefit it is created, are as effectually secured, as if the legal estate passed to the trustees. On the death of the testator the power attaches immediately on the land, and no subsequent disposition can be made, nor incumbrances created, by which its execution can be defeated. There are other reasons, however, which have weighed principally with the revisers in recommending this section ; under the present rules of law, the construction of a will containing an authority to executors to sell, is a matter of great difficulty ; and the question whether the trust is to be construed as a naked authority, or as a power coupled with an estate or interest in the lands, has been a frequent source of litigation. Thus according to Lord Coke, if a man devise that his executors ' shall sell his lands, they have a bare authority and no interest ; but if he devise his lands to be sold by his executors, they take the legal estate.' It is true Mr. Hargrave in his note on the passage speaks of this distinction as curious and overstrained, yet there seems a decisive weight of authority in its favor. We would abolish this and similar distinctions, not merely as curious and overstrained, but as entirely useless, unless to propagate lawsuits. . . . As an additional authority in support of our views, we add the recommendation of Lord Coke himself, who says, ' it is better for a testator to give to his executors an authority, than an estate, unless his meaning be they should take the profits of his lands in the meantime.' (Coke Litt., 113 *a*, and Har. & But. note ; Sugden on Powers, 140 ; 6 John. Rep., 92.)" See *ante*, p. 99.

The purpose of an attempted trust covered by the statute above quoted is valid, as far as it goes. If the sale is directed for the purpose of paying debts, or the sale or mortgage is directed for the benefit of annuitants or other legatees or for the purpose of satisfying any charge on the land, then the purpose named falls precisely within the terms of one or the other of two permitted express trusts, but in such cases (in testamentary trusts) the law further provides that unless the trustee shall also be empowered to receive the rents and profits, no title shall vest in the trustee, but the trust shall be valid as a power. The defect here consists not in the purpose of effecting a sale or mortgage through a trust, but in the method of creating such a trust by will without giving the trustee the right to receive the rents and profits.

Under this head a somewhat curious point was passed on in *Graham* v. *Livingston*, 7 Hun, 11. There land was devised to executors to sell, and hold the proceeds and apply the corpus as needed to the use of certain beneficiaries; the executors were not empowered to receive the rents and profits. It therefore came within the terms of the statute just cited. But the court held that inasmuch as the trust to sell was imperative, it effected, in its statutory character as a power, an equitable conversion, and so that the land did not descend to the heirs subject to a power, but was to be treated as personal property immediately on testator's death. Whether this view is correct, in holding that no legal title to the land, pending sale, vested in the heirs, so as to render them necessary parties to a suit to foreclose a mortgage given by testator, might seem at least doubtful. Compare *Eisner* v. *Curiel*, 2 App. Div. 522; *Delafield* v. *Barlow*, 107 N. Y. 535. See *post*, § 557 *g*. In *Tickel* v. *Quinn*, 1 Dem. 425, the devise was to executors in trust, with no power to receive rents and profits, but "with power to sell." This is said by the court to be a trust turned by the statute into a power effecting conversion.

(*b*) The other class of attempted active trusts which the law saves in substance by sustaining them as powers, are covered by the following provision: "Where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article, no estate shall vest in the trustees;

but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions of this chapter. Where a trust is valid as a power, the real property to which the trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power." Real Prop. L., § 79. *Woerz* v. *Rademacher*, 120 N. Y. 62 (68); *Holly* v. *Hirsch*, 135 N. Y. 590 (594); *Crittenden* v. *Fairchild*, 41 N. Y. 289 (292); *Coster* v. *Lorillard*, 14 Wend. 265 (323); *Clark* v. *Crego*, 47 Barb. R. 599, aff'd 51 N. Y. 646. The purpose named (1) is one which is not specified in § 76 enumerating the classes of valid express trusts (see *ante*, § 394); but which, nevertheless (2), is one which may be lawfully performed under a power; and (3) the attempted trust must in all other respects be valid, that is, there must be a complete devise or grant of the title (*i.e.*, there must be, in order to bring it within this particular section), and the term of the attempted trust must not be illegal. In other words, if the sole objection is that the purpose, good enough in itself, is not one of those for which the law authorizes an express trust, then the law saves it by turning it into a power; but if it violates the law in other respects, or falls short, in any other way, of effecting a valid trust, then it is either a passive trust, which the law turns into a direct devise to the proposed beneficiary; or is entirely invalid; or, in some cases may be sustained as a devise subject to a charge. See *ante*, § 519. Examples of attempted trusts held void as such but valid as powers, are trusts to partition, *Hawley* v. *James*, 16 Wend. 60 (149, 161); to partition and convey, *Id.*; *Gilman* v. *Reddington*, 24 N. Y. 9 (15); to sell, merely, *Janssen* v. *Wemple*, 3 Redf. 229; to sell and distribute generally, see *Downing* v. *Marshall*, 23 N. Y. 366 (381, with which compare the statutory trust to sell and from the proceeds to pay legacies; see *ante*, p. 291); to divide or partition, *Cooke* v. *Platt*, 98 N. Y. 35 (38); to sell and convey, *Chamberlain* v. *Taylor*, 105 N. Y. 185 (190); to sell and return the proceeds to the grantor, *Heermans* v. *Robertson*, 64 N. Y. 332 (340); *Fellows* v. *Heermans*, 4 Lans. 230 (whether this was not a mere agency, *quaere*, *Heermans* v. *Burt*, 78 N. Y. 259); to sell, use and dispose of for the benefit of A, *Smith* v. *Bowen*, 35 N. Y. 83;

to appraise, divide and convey, *Manice* v. *Manice*, 43 N. Y. 303 (364); to partition, *Henderson* v. *Henderson*, 113 N. Y. 1 (11); to hold in trust as security for claims of the so-called trustee against the beneficial owner, *Knickerbocker L. I. Co.* v. *Hill*, 3 Hun, 577; assignment of a leasehold in trust to convey to designated infants at majority, *Bennet* v. *Rosenthal*, 11 Daly, 91; a conveyance by A to B, "in trust for A's use, benefit and advantage," B to manage and control the estate in B's discretion, and pay therefrom such sums as B deems reasonable for A's support, and to pay therefrom future debts of A, so far as B deems prudent. *Matter of Hall*, 24 Hun, 153. If an express *trust*, vesting title in the trustee, is *intended*, but is void, it cannot be held good as a power (but this rule must certainly be confined to cases where title is a requisite to the performance of the duties imposed). *Garvey* v. *McDevitt*, 72 N. Y. 556. A grant or devise to A in trust merely to convey to B, does not fall within this subdivision, and the land, instead of vesting in the heirs subject to a power, vests in the proposed beneficiary of the attempted trust, *Adams* v. *Perry*, 43 N. Y. 487 (496); for the latter is entitled to the immediate possession and right to the rents. See *ante*, § 518.

It is to be noticed that the statute (§ 79) in terms applies only to cases where an express trust is created "for any purpose *not enumerated* in the preceding sections" defining the four permitted classes. That this is to be taken literally, and that the statute does not apply to a case where the attempted trust *does* have for its purpose one of the same objects enumerated in the sections preceding § 58, but is defective in some other respect, seems to be accepted as the proper construction. *Townshend* v. *Frommer*, 125 N. Y. 446 (456); *Garvey* v. *McDevitt*, 72 N. Y. 556; *Gano* v. *McCunn*, 56 How. Pr. 337. There are, however, two qualifications upon this result; for, first, Real Prop. L., § 77, provides that "a devise of real property to an executor or other trustee, for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any title in him; but the trust shall be valid as a power, and the real property shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power." An attempted testamentary trust, therefore, which does,

like those of the first or second permitted classes (Real Prop. L., § 76), have a sale or mortgage for its purpose, but fails as a trust for lack of authorization to receive the rents, is good as a power in trust. *Clift* v. *Moses*, 116 N. Y. 144 (151–152); *Smith* v. *Bowen*, 35 N. Y. 83 (88–89). This section (77) just quoted is confined to testamentary trusts. The other qualification on the rule laid down in § 79 is, that even if the *purpose* sought does correspond with one of those enumerated in § 76, yet, if invalid as a trust, it may be good as a power, if avowedly created as such, and not as a trust, and if the acts required can all be fully performed under a power. *Tucker* v. *Tucker*, 5 N. Y. 408 (413).

The general result may be summed up thus: (*a*) There are four purposes for which express trusts may be created. (*b*) If an attempt is made to create an express trust for any *other* purpose, it will, if the purpose is not unlawful, be held good as a power in trust. (*c*) If an express trust is attempted for one of the four specified purposes, but fails for some other reason, it cannot be sustained as a power, except that (*d*) if it is a testamentary trust to sell or mortgage, and so requires for its validity authority to receive the rents, the omission of that authority will not vitiate the provision, but it will take effect as a power; and also that (*e*) a power may be directly created as such, even for any of the purposes enumerated in the four classes (§ 76), if capable in its nature of effectuating that purpose, and it would seem that this class would include not only cases where a power was attempted in so many words, but also cases where the wording and the purpose were fairly consistent with the construction that a power and not a trust was intended.

§ 553. **Record—Probate.**—The authority of a donee of a power depends, of course, on the validity of the deed or will creating the power, and may often be affected by questions relating to record of the deed, validity of proceedings to prove the will, etc. See *Jenkins* v. *Young*, 35 Hun, 569; *Fleck* v. *Rau*, 9 App. Div. 43; but compare, as to foreign wills, *Pollock* v. *Hooley*, 67 Hun, 370 (377); *Doolittle* v. *Lewis*, 7 Johns. Ch. 45; *Hauselt* v. *Patterson*, 124 N. Y. 349 (360). *Post*, § 596. As to the record of the instrument creating the power as effect-

ing the standing of the power as a lien or charge on the land, see Real Prop. L., § 127.

(3) *The Legal Title.*

§ 554. **Title vests subject to power.**—Where a valid power is created, the title to the land affected thereby vests in the grantee or devisee of the land, or, in so far as not granted or devised, remains in the grantor, or passes to his heirs, subject to the execution of the power. *Harvey* v. *Brisbin*, 143 N. Y. 151; *Chamberlain* v. *Taylor*, 105 N. Y. 185 (192); *Purdy* v. *Hayt*, 92 N. Y. 446 (455–456); *Lent* v. *Howard*, 89 N. Y. 169; *Vernon* v. *Vernon*, 53 N. Y. 351 (358); *Crittenden* v. *Fairchild*, 41 N. Y. 289; *Smith* v. *Bowen*, 35 N. Y. 83. As to the effect of a power as a charge on the land, see Real Prop. L., § 127.

§ 555.—A power in executors to sell land is not inconsistent with a precedent devise to another. If a sale is effected, the devisee takes the proceeds. *Haight* v. *Pine*, 3 App. Div. 434; *Crittenden* v. *Fairchild*, 41 N. Y. 289. So if the donee of the power is to sell and hold the proceeds in trust for the devisee. *Bundy* v. *Bundy*, 38 N. Y. 410. The same result may follow even if there is a nominal but ineffective grant of title to the donee of the power. *Vernon* v. *Vernon*, 53 N. Y. 351 (362). Thus, a conveyance to B merely "in trust for C," with power in B to "sell and convey or mortgage, without the appointment of a guardian" (for C), indicates an intention that the power is to be executed wholly for the benefit of the infant; it is a general trust power under § 117, and the land passes to and vests in C subject to the execution of the power. *Syracuse Sav. Bk.* v. *Holden*, 105 N. Y. 415 (418). Of course the title and the power may be vested in the same person, as where one holds title under a valid express trust to receive and apply rents, and also holds a power to sell and reinvest. *Miller* v. *Wright*, 109 N. Y. 194. So where land is devised to one beneficially in fee, subject to a power in himself as executor to sell for executorial purposes, *Haight* v. *Pine*, 3 App. Div. 434. See also *post*, § 571 *et seq.*

The title which vests subject to the power, is such as to make those vested therewith "freeholders": *e.g.*, qualifies them to sign a freeholder's certificate as to necessity and propriety of

opening a highway through land of non-consenting owner. *People* v. *Scott*, 8 Hun, 566. Here no grantee of the power was named; *semble*, the same result would follow though a grantee *had* been named. *Id.*, p. 568. See *Merriman* v. *Utica B. L. S. R. Co.*, 18 Misc. 269. Where land is devised to A and B, but power to sell the same, if required, to pay debts, is given to executors, and after the debts are paid, power to either partition, or sell and distribute the proceeds: (1) The power to sell and pay debts can only be exercised if the personalty is insufficient. (2) The power to partition, or to sell and distribute proceeds, can only be exercised after the debts are paid. (3) In case of sale, the amount not required for debts retains the character of realty. (4) The land vests in A and B subject to the power to sell to pay debts, and, after the debts are paid, subject to the power to partition or to sell and distribute. A and B could therefore mortgage or convey their interests, as land, subject to the exercise of the powers, and the grantee, or the purchaser on foreclosure, would take the proceeds in case of sale under the power, as land. *Drake* v. *Paige*, 127 N. Y. 562. The power to sell real and personal property, and thus reduce to cash, and distribute, does not necessarily import lumping and pro rata division of the entire estate as one fund. For example, where the residuary estate, real and personal, is given to testator's "heirs and next of kin in the same proportions in which it would be divided or distributed in case of his death intestate," and the will directs its distribution in cash and for that purpose gives the executors a power of sale, the next of kin take the personalty, and the heirs the proceeds of realty, or, if not sold, the realty itself. *Matter of Bingham*, 127 N. Y. 296 (314). A direction to the executor to sell land, and a devise of the proceeds, while it vests the naked title in the heirs, may be a devise of the land so far as to bring it within the statute bringing after acquired lands within the scope of a general devise of all testator's lands. *Byrnes* v. *Baer*, 86 N. Y. 210. A power in B to sell, and from the proceeds to pay debts and legacies, with a gift of the residue to B, does not give B the fee. He has a mere power, and a beneficial interest in a portion of the proceeds. *Germond* v. *Jones*, 2 Hill, 569 (574 *et seq.*). Where land is devised in fee subject to a power in another to sell and hold the proceeds in trust for the devisee dur-

ing her life, this provision does not necessarily cut down the fee to a life estate. *Vernon* v. *Vernon*, 53 N. Y. 351 (358).

In case of a devise and bequest subject to a power to sell or partition among the devisees living at the time of actual sale or partition, the land vests defeasibly in the devisees, but the personalty remains in the hands of the executors, and the interests of the legatees remain contingent until the division. *Henderson* v. *Henderson*, 113 N. Y. 1 (14). A power of sale, even though imperative, and effecting equitable conversion, leaves the title in the heirs or devisees, and the executor, as donee of a power, cannot sue for damages for trespass. His remedy to prevent spoliation in the nature of waste is in equity. *Ogsbury* v. *Ogsbury*, 115 N. Y. 290 (294); see *Lent* v. *Howard*, 89 N. Y. 169. See *post*, § 557 *g*. An executor with power of sale, to pay debts and legacies, may maintain a suit in equity against a stranger claiming title in hostility to donee's power to sell, in order to quiet title and settle his right to sell the land and remove an obstruction to the performance of plaintiff's duty. And this, even though there is no equitable conversion, and title is in the heirs. *Ogsbury* v. *Ogsbury*, 115 N. Y. 290 (295). Where there are debts of decedent, the executor may and should bring an action to have cancelled and discharged of record a forged or otherwise void or voidable mortgage, or other conveyance, purporting to have been given by decedent; the ground being that it "interferes with the estate" of the decedent (L. 1858, ch. 314, Real Prop. L., § 232); and that though the executor does not take the real estate, and as to that is not a trustee, he has the power, and is required, in a proper case, to have it sold. *Nat. Bank* v. *Levy*, 127 N. Y. 549 (552); *Lichtenberg* v. *Herdtfelder*, 103 N. Y. 302; *Barton* v. *Hosner*, 24 Hun, 467. A mere naked power of sale in an executor, does not authorize him to maintain an action for an award for the lands, taken by eminent domain after testator's death. *Cashman* v. *Wood*, 6 Hun, 520, but *semble*, he might recover if (*a*) he was to receive proceeds to carry out trusts created by the will; or (*b*) needed them to pay debts. *Id.* As to the authority of executors vested with a power of sale, to dedicate land to public use by their description in a conveyance, under the power, of adjoining property, see *Bloomfield* v. *Ketcham*, 25 Hun, 218, reversed and proceeding

dismissed for defect in papers submitting controversy, 95 N. Y. 657, see 11 Abb. N. C. 269, note. Though it is no part of the duty of an executor to pay taxes on land which accrue after testator's death, yet if he has a power to sell, he may pay such taxes in order to enable him to convey a clear title. *Matter of Perry*, 5 Misc. 149 (153). A power in trust, to sell land, vests no title in the donee of the power, and he cannot maintain an action of ejectment against those in whom the legal title has vested, though they are in possession. *Smith* v. *Chase*, 90 Hun, 99.

§ 556. **Intermediate rents.**—Where there is no specific devise of land, but a bare power of sale is given to the executor, not effecting a suspension (in which case a different rule applies, *post*, § 489), and the land accordingly descends to the heirs, subject to the power, the right of possession follows the title, and the heirs are entitled at law to the intermediate rents and profits. But where the power of sale operates as an immediate conversion of the land into personalty, accompanied with a gift of the proceeds, in equity the intermediate rents and profits go with and are deemed to be a part of the converted fund, and the heir may be compelled to account therefor to the executor, and the latter to the beneficiary for so much thereof as is received by him as well as for the proceeds of sales. *Lent* v. *Howard*, 89 N. Y. 169; *Moncrief* v. *Ross*, 50 N. Y. 431; *Harper* v. *Chatham Nat. Bank*, 17 Misc. 221. In *Campbell* v. *Johnston*, 1 Sandf. Ch. 148, it happened that the heirs and the beneficiaries of the power were the same persons. But though the heirs were there held entitled to the income, it was in their capacity not as heirs but as beneficiaries that they were thus entitled. And where an executor, having power to sell, to pay legacies, prior to sale received the rents without authority, but all the land was needed to pay the legacies, he was accountable as executor to the legatees for the rents and not to the residuary devisees subject to the power. *Matter of Boyd*, 4 Redf. 154. Where lands are devised subject to a mere power in executors to sell or mortgage to pay testator's debts, the devisees are entitled to retain the rents and profits received by them, prior to sale under the power, and prior to any steps by testator's creditors to subject them to the

payment of debts, *e.g.*, by the appointment of a receiver. This is so, even though the total estate is insufficient to pay testator's debts. The creditor cannot compel the devisees to account for past rents received by them. *Clift* v. *Moses*, 116 N. Y. 144. And a power to sell, to effect distribution among those in whom the title vests, does not authorize the donee of the power to collect the rents, or make expenditures for improvements pending a sale. And if he is the executor, his acts in those respects are not the subject of an accounting from him as executor in the Surrogate's Court. *Matter of Spears*, 89 Hun, 49. But power to sell and collect "proceeds" includes "rents" before sale. *Kearney* v. *Miss. Soc'y*, 10 Abb. N. C. 274 (278). Where land is subject to an imperative power in the executor to divide and convey it to certain trustees, they may, before such conveyance, maintain a suit in equity to restrain the executor, either as such or individually, from collecting the rents, which should come into their hands as trustees, and to compel a sale of enough of the land to satisfy legacies charged thereon and a conveyance of the residue to the trustees. *Stevens* v. *Stevens*, 69 Hun, 514 (for further facts in this case, see *Stevens* v. *Melcher*, 80 Hun, 514). For the construction, on the point of intermediate rents, of a will creating a power to rent, and receive and apply the rents to the use of several children, till the youngest should come of age and then sell, and distribute the proceeds among them, where one of the children died before the majority of the youngest, see *Rauchfuss* v. *Rauchfuss*, 2 Dem. 271, and compare *Riley* v. *Diggs*, *Id.* 184.

§ 557. **Partition.**—Where a power is created to sell land, the question has been raised whether those in whom the legal title is vested may, pending the exercise of that power, bring an action of partition. The decisions appear, at first sight, somewhat contradictory. Before examining them, attention may be called to the fact that in some cases the power is given for the specific purpose of partition and distribution, and in others for general purposes which merely involve an ultimate distribution of the surplus remaining after satisfying other directions. Again, those who hold the legal title, may have no beneficial interest therein whatever; or they may be the same persons for whose benefit

the land is to be sold. And again, the power may be present or postponed. And finally, the power may be imperative, and effect an equitable conversion ; or it may be discretionary and effect no conversion. The following points appear to be settled :

(*a*) If the power is such that those beneficially interested may elect to take the land itself (*post*, § 691 *et seq.*), the fact that they have all so elected, before suit brought, extinguishes the power, and furnishes a basis for an action for partition. *Prentice* v. *Janssen*, 79 N. Y. 478 ; *Purdy* v. *Wright*, 44 Hun, 239.

(*b*) And if, in such a case, they all unite in seeking partition, the action itself constitutes an election. *Mellen* v. *Mellen*, 139 N. Y. 210 (221) ; compare *Mellen* v. *Banning*, 72 Hun, 176 ; *Morse* v. *Morse*, 85 N. Y. 53 (58).

(*c*) But unless they all unite for that purpose, the bringing of the action cannot constitute an election. *Fritz* v. *Fritz*, 43 State Rep. 755 ; *Mellen* v. *Mellen*, 139 N. Y. 210 (221–222) ; *McDonald* v. *O'Hara*, 144 N. Y. 566.

(*d*) And if the proceeds of sale are to be held in trust, there can be no election, and no action for partition. *Underwood* v. *Curtis*, 127 N. Y. 523.

(*e*) And if the legal title to all the land affected by the power, is in a trustee, there is, of course, no right in the heirs or beneficiaries to sue for partition of the estate thus vested, *Morse* v. *Morse*, 85 N. Y. 53 ; *Stryker* v. *Lynch*, 11 N. Y. Leg. Observer, 116 ; *Harris* v. *Larkins*, 22 Hun, 488 ; though if there is a remainder limited on the trust, those in whom it is vested may do so. *Chapman* v. *Cowenhoven*, 7 Hun, 341.[1]

(*f*) And if the heirs, devisees or legatees are not in a position to elect, *e.g.*, where the absolute vesting of title was only to take effect upon the actual exercise of the power or the earlier death

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[1] As to action for partition by a remainderman (without sale except in certain cases), see Code C. P., § 1533, and Mr. Throop's Preliminary Note (preceding § 1532) in his edition of the Code, explaining its proposed effect upon the questions raised in *Fleet* v. *Durland*, 11 How. Pr. 489 ; *Blakeley* v. *Calder*, 15 N. Y. 617 ; *Howell* v. *Mills*, 56 N. Y. 226 ; *Sullivan* v. *Sullivan*, 66 N. Y. 37 ; *Brevoort* v. *Brevoort*, 70 N. Y. 136, and other cases. As to the present statute, see *Diehl* v. *Lambart*, 9 Civ. Pr. R. 267 ; *Hughes* v. *Hughes*, 30 Hun, 349.

of the respective primary devisees, an action for partition will not lie on behalf of those thus contingently interested. *Henderson* v. *Henderson*, 113 N. Y. 1 (13).

(*g*) And if there is an imperative power to sell, in a trustee holding the legal title, and effecting equitable conversion, there is no title to the *land* itself, as such, in the legatees thereof in remainder. They are, for instance, not necessary parties to a suit for partition brought by those holding undivided shares as co-tenants with the trustee. *Delafield* v. *Barlow*, 107 N. Y. 535. See *Davies* v. *Davies*, 15 Week. Dig. 118 ; and compare *Miller* v. *Wright*, 109 N. Y. 194 (200) ; and *McDonald* v. *O'Hara*, 144 N. Y. 566 (568) ; see § 552, end of subd. *a*, and § 555, third paragraph.

(*h*) If the legal title is vested in persons who have no beneficial or trust interest whatever, they cannot seek to partition the bare title. *Purdy* v. *Wright*, 44 Hun, 239 (240–241). See *McGregor* v. *McGregor*, 22 Week. Dig. 305.

(*i*) The following cases proceed on the theory that even apart from any election, the existence of a trust power to sell and distribute among those vested with the title to the land, does not *per se* constitute a bar to a suit for partition. *Duffy* v. *Duffy*, 50 Hun, 266, aff'd 130 N. Y. 654 ; *Mellen* v. *Banning*, 72 Hun, 176 ; *Palmer* v. *Marshall*, 81 Hun, 15. But *Blanchard* v. *Blanchard*, 4 Hun, 287, aff'd, 70 N. Y. 615, was an action for partition based on the invalidity of the testamentary disposition. The power to sell and divide was sustained, and judgment rendered for defendants. It is cited in *Mellen* v. *Banning*, 72 Hun, 176 (184), as supporting the right to partition pending the exercise of the power.

(*j*) A trustee for a life term, of an undivided share in lands, may, although he has also a power to convey that share, bring an action for partition against his co-tenants. *Gallie* v. *Eagle*, 65 Barb. R. 583.

§ 558. **Power subject to life estate.**—Just as a title may vest subject to a power, so a power may by its terms be subject to a title. In both cases the two can exist together only if consistent. *McLean* v. *Macdonald*, 2 Barb. R. 534. Thus a power to convey, subject to an absolute present estate in fee, would

have nothing to operate on ; but a power to convey the fee, subject to a life estate, would be a valid power to convey the remainder. In this latter case, if a fee is to be conveyed, including the life estate, it is necessary for the life tenant to join or consent in some sufficient manner. But if a grantee of a power to sell the remainder procures the consent of the life tenant to a conveyance of the whole fee, under a contract binding her to accept only a fixed return on the proceeds, the life tenant is bound down to that return only if the agreement is founded on a valuable consideration. If the grantee of the power does not bind himself personally to pay that fixed sum, the reciprocal agreement to claim no more cannot hold. If the grantee of the power is also an executor, the fact that he binds himself as executor to pay the fixed sum does not help the matter, as he has no power, as executor, to make such an agreement. *Post* v. *Benchley*, 48 Hun, 83, appeal dismissed, 110 N. Y. 665. A vested estate, whether present or future, subject to a power of sale, is alienable, devisable and descendable, subject to the power. *Sayles* v. *Best*, 140 N. Y. 368. And so is a vested right to a contingent estate. 2 Washb., Real Prop., 5th ed., 775 ; *Hennessy* v. *Patterson*, 85 N. Y. 91 ; *Nellis* v. *Nellis*, 99 N. Y. 505 (516) ; *Ham* v. *Van Orden*, 84 N. Y. 257 (270).

§ 559. **Power subject to lien or charge.**—So a power may be given to sell land subject to a mortgage. And if the deed in execution of the power fails to state whether the mortgage was allowed as part of the consideration, the executor (donee of the power) may prove the actual value and receipts by parol. *Upson* v. *Badeau*, 3 Bradf. 13. Where a power is given to sell land (encumbered with a mortgage), and divide the proceeds, the portion divisible is only the proceeds of the equity. *Rauchfuss* v. *Rauchfuss*, 2 Dem. 271. A power to give and devise by will in such proportions as the donee should deem best, does not necessarily require gross or lump gifts, but warrants defeasible gifts, contingent limitations over, etc. *Beardsley* v. *Hotchkiss*, 96 N. Y. 201 (218–219). So a power to dispose of land may authorize a disposition piecemeal—first a life estate, then a remainder, etc. *Crooke* v. *County of Kings*, 97 N. Y. 421 (449). Where a power of sale is coupled with a gift of legacies, each of which is

made "a first charge upon my estate into whose hands soever it may come," this has been held not to prevent the donee of the power from giving title clear of the charge. The term estate refers to testator's *title* and not to the corpus. The purpose is, to make these legacies first payable out of the total fund, but not to interfere with the cashing of that fund by converting the land. *Bradford* v. *Mogk*, 55 Hun, 482.

CHAPTER XVI.

BENEFICIAL POWERS.

§ 560. Definition.—See *ante*, § 544.

(1) *When they Involve a Fee.*

§ 561. General principle.—An absolute beneficial title in fee, and a beneficial "power" over the property, cannot co-exist in the same person, for the absolute beneficial owner in fee has, by virtue of such ownership, full and sweeping power to deal with the property, and dispose of it, and there is no opportunity to superadd anything to such dominion. *Jennings* v. *Conboy*, 73 N. Y. 230 (237); *Hetzel* v. *Barber*, 69 N. Y. 1. So, also, if an attempt be made to separate the absolute ownership into two distinct elements, viz., (*a*) a specified power, and (*b*) all the other incidents of title and ownership in fee; and to then confer them both on the same person beneficially, to be held by him in his own right as two separate things, the result is that they at once merge, and he becomes vested with an ordinary fee accompanied by all its usual incidents, and the technical power ceases to exist as such. *Jennings* v. *Conboy*, 73 N. Y. 230 (237); *Hetzel* v. *Barber*, 69 N. Y. 1. It is obvious that this principle is one which might be regulated, and modified, or even abolished by statute. There is nothing essentially impossible in the idea of an owner in fee holding his land subject to a technical power of disposition or control in himself (Farwell on Powers, 2d ed., 38), just as he may in fact hold by assignment, and without merger, a mortgage on his own land, executed by himself. On the other hand, the principle itself might be extended by statute so as to effect a merger and carry the absolute title even in cases where the given title and the given power would not, when pieced together, cover all the incidents of an absolute estate except as helped out by a statutory provision.

§ 562. **Statutory provisions.**—It is this latter course that has been adopted by our Legislature ; so that we find two classes of cases where a title less than a fee, and a power, held by the same person, unite and give him a fee (*post*, §§ 564, 565) ; and also one class of cases where the grant of a power only to a person who has no particular estate, operates to give him a title in fee (*post*, § 567). In all three classes the power, to effect this result, must be "an absolute power of disposition"—a term defined in the next section.

§ 563. **Absolute power of disposition.**—"Every power of disposition by means of which the grantee [*i.e.*, the donee] is enabled, *in his lifetime*, to dispose of the entire fee *for his own benefit*, is deemed absolute." Real Prop. L., § 133. (But the scope of this definition is enlarged by the terms of § 134, quoted below, by which a general and beneficial power to *devise* the inheritance, given to a tenant for life or years, is also to be deemed an absolute power of disposition. The reference to a power to dispose "in his lifetime," means by an instrument operative in his lifetime. *Cutting* v. *Cutting*, 86 N. Y. 522 (534).

Inasmuch as no technical power over property can be conferred on a person who is the owner of an absolute and beneficial fee in possession, it follows that the only person to whom an absolute beneficial power can be given is either (*a*) one who has an estate less than a fee, or (*b*) one who has no particular estate at all. Accordingly, the statute proceeds to make the following provisions.

§ 564. **Absolute power, and estate less than fee.**—"Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers, and encumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts." Real Prop. L., § 129. *Jackson* v. *Edwards*, 7 Pai. Ch. 386 (400–401), aff'd 22 Wend. 498. See *post*, §§ 577, 578. The power in a life tenant, such as to give him a fee, may be implied, *e.g.*, from the gift of a remainder in fee to his heirs or assigns, *Goetz* v. *Ballou*, 64 Hun, 490.

For a discussion of the application of this statute, where, coupled with an absolute power in the life tenant to sell and consume, there is a remainder to another of any balance of proceeds that may be left, see *post*, §§ 568 *d*, and 577.

§ 565. Absolute power, and no particular estate.—" Where a like [*i.e.*, absolute and beneficial] power of disposition is given to a person to whom no particular estate is limited, such person also [*i.e.*, as well as in § 129, quoted *ante*, § 564] takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers, and encumbrancers." Real Prop. L., § 130.

§ 566. Testamentary power, when not essential.—If an absolute and beneficial power of disposition be given, under either of the last two sections, to be exercised during the donee's life only, and he is not authorized by the instrument creating the power to exercise it by will, still, under § 133 (*ante*, § 563), he thereby acquires a fee, for he is enabled, " in his lifetime," to dispose of the entire fee for his own benefit. And this is so, whether he has, or has not, independently of the power, any estate in the property. But nevertheless, when considered in connection with the Taxable Transfer Act, it does not give him an absolute fee, for there is a restraint upon alienation by means of a will, *Matter of Cager*, 111 N. Y. 343 ; nor does it give him a mere life estate such as to permit of fixing the taxable value of the estate in remainder, for that is purely contingent upon the non-exercise of his power of sale during life. *Id.* See the present Act.

§ 567. Testamentary power only, when sufficient.—" Where a general and beneficial power to devise the inheritance is given to a *tenant for life, or for years*, such tenant is deemed to possess an absolute power of disposition within the meaning of and subject to the provisions of the last three sections" (*i.e.*, §§ 129, 130, 131). Real Prop. L., § 132. *Hume* v. *Randall*, 141 N. Y. 499 ; *Deegan* v. *Wade*, 144 N. Y. 573 (577–578). As to personal property, see *Onondaga T. & D. Co.* v. *Price*, 87 N. Y. 542. In such a case, although the power of disposition does not by its own

express terms enable the donee thereof to dispose of the fee during life, the statute provides that it shall in fact enable him to do so. (Cases above cited.) And the policy of the statute is operative even though the instrument creating the life estate and the power to dispose of the inheritance by will, also attempts to annul the effect of the statute by expressly providing that the life tenant shall not exercise the power during his life. Such an attempt is futile ; the statute has been evoked, the fee vests, and the prohibition in the instrument, being inconsistent with the title in fee, fails. *Deegan* v. *Wade*, 144 N. Y. 573 (578). But compare *Livingston* v. *Murray*, 68 N. Y. 485 (491). See *post*, § 576.

Under the foregoing provisions, therefore (*a*), if the donee is a tenant for life or years, he acquires a fee (absolute except as therein provided) by virtue of the grant of an absolute and beneficial power to dispose of the fee *inter vivos* or by will, or *inter vivos* only, or by will only ; (*b*) if he has no particular estate, he acquires a fee (absolute with the exception above mentioned) by virtue of the grant of an absolute and beneficial power to dispose of the fee *inter vivos ;* (*c*) if he has no particular estate, a power to dispose of the fee by will does not confer a fee upon him.

§ 568. **Purchasers, encumbrancers, creditors and remaindermen.**—Where under any of the foregoing statutes the donee takes a fee, the following distinctions are to be noticed.

(*a*) As to purchasers, the donee holds a fee ; he may convey an absolute estate, and as the power is purely beneficial, he is absolutely entitled to the proceeds.

(*b*) As to encumbrancers and creditors he holds a fee, and they may proceed, in respect thereto, as if the fee were (as it is, in their favor) absolute.

(*c*) If the power is not exercised, and if the property is not sold for the satisfaction of debts, then any remainder duly limited takes effect. And as the remainder is only to be defeated on the happening of one or the other of the contingencies named, it will not be cut off by a compulsory sale not falling within their scope (*e.g.*, by a sale under a decree in partition) unless, in the given case, the donee's consent to such a sale may operate to im-

part to it the character of a sale under the power. *Jackson* v. *Edwards*, 7 Pai. Ch. 386, aff'd 22 Wend. 498. See also *post*, § 577.

(*d*) There is a class of cases where an absolute power is given to a life tenant to sell the fee, but where the remainder in the land in case the power is not exercised, and in the proceeds in case of sale, are all given over to others. Such an absolute gift in remainder does not interfere with the grant of an absolute fee in the land, under the power, *Leonard* v. *Am. Bapt. H. M. Soc'y*, 35 Hun, 290; *Fernbacher* v. *Fernbacher*, 4 Dem. 227 (241); *Ackerman* v. *Gorton*, 67 N. Y. 63; but the case does not fall within the scope of the sections above considered, and the donee does not acquire a fee. For those sections only apply where "the grantee is enabled to dispose of the entire fee for his own benefit," Real Prop. L., §§ 132, 133, and where the power is "not accompanied by a trust," *Id.*, §§ 129, 130. But in the class of cases under consideration the power is in trust, *Fernbacher* v. *Fernbacher*, 4 Dem. 227 (241); *Ackerman* v. *Gorton*, 67 N. Y. 63; *Rose* v. *Hatch*, 125 N. Y. 427 (432–433), for there are "persons other than the donee of the power who are designated as entitled to the proceeds, or some portion of the proceeds, or other benefits to result from its execution."

There is another class of cases, where there is an absolute power to sell and consume, in the life tenant, with remainder in any balance not consumed. *Post*, § 577.

There is still another class, where the power is restricted to a right to sell and to consume the proceeds only so far as actually needed for support, etc., with remainder over of what may be left. See *post*, § 577.

(*e*) In all cases "where such [*i.e.*, absolute and beneficial] a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee." Real Prop. L., § 131. This section applies to all three cases (*ante*, §§ 564, 565, 567), where such a power confers a fee. *Id.*, §§ 131, 132. But the mere absence of any remainder does not give the donee a fee, unless the other necessary elements are present. Thus, a conditional power in a life tenant to sell and consume the corpus does not confer a fee, even though no remainder is limited on the life estate. *Swarthout* v. *Ranier*, 143 N. Y. 499.

§ 569. **Absolute power reserved.**—"Where the grantor in a conveyance reserves to himself, for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned." Real Prop. L., § 125.

§ 570. **The estate in the donee.**—In addition to the obvious distinction above mentioned between the sections relating to the cases where the power and an estate meet in the same person, and those where a power is given to a person not taking any particular estate, it is to be noticed (*a*) that an estate for life or years may, in given cases, already belong to the donee when a power is conferred upon him to dispose of the remainder; or (*b*) he may acquire both estate and power by the same instrument; or (*c*) having first acquired a power to dispose of the fee such that it does not in itself confer a fee upon him (*e.g.*, a testamentary power given to a person having no particular estate), he may thereafter acquire an estate for life or years. The bearing of the statutes upon the first and third of these classes does not appear to be illustrated by the authorities. See *Jackson* v. *Edwards*, 7 Pai. Ch. 386, aff'd 22 Wend. 498. The questions thus raised as to the bearing of ownership existing when the power is conferred; ownership acquired by virtue of the same instrument which creates the power; and ownership acquired subsequently, can be of importance, in reference to the subject under discussion, in only one case; because if, at the creation of the power, the grantee has no estate, § 130 applies; if he has an estate for life or years, § 129 applies; if he has an absolute beneficial fee, no power can be given to him. Under § 132, however, these questions might be of importance, for it is only in connection with a tenancy for life or years that an absolute and beneficial power to devise the inheritance confers a fee.

But there are cases, not involving the present question, where the question whether a tenant for life or years, who also holds a power of sale, did or did not acquire the estate and the power by virtue of the same instrument, may be important. See, for example, § 572, *post*.

(2) *When they do not Involve a Fee.*

§ 571. **Life estate and power both in trust.**—The provisions above quoted do not apply to cases where the life tenant, who is also a grantee of a power of sale, holds his title in trust. His trust may be of such a character, in itself, as to give him a fee, in trust, as a necessary basis for the performance of the trust purpose, but the mere fact that as trustee he holds title for a life and also holds power to sell in fee, does not enlarge his life estate into a fee. *Matter of Tienken*, 131 N. Y. 391 (402).

§ 572. **Beneficial life estate and power in trust.**—So where a person holds a beneficial life estate, and also holds a power to convey the fee which is in trust either wholly or in part, there is no merger. *Haas* v. *Kuhn*, 67 Hun, 435. It follows that if a judgment against him be docketed, and his estate sold thereunder, he may still convey under the power, and thereby destroy his interest in the land and subvert the title acquired by the judgment purchaser. *Rose* v. *Hatch*, 125 N. Y. 427, 434); *Coleman* v. *Beach*, 97 N. Y. 545 (558); *Leonard* v. *Am. B. H. M. Soc'y*, 35 Hun, 290; *Fernbacher* v. *Fernbacher*, 4 Dem. 227. See *Matter of Blauvelt*, 131 N. Y. 249. If the executor, who holds a power in trust to convey, is also a beneficial life tenant subject to the execution of the power, any encumbrance which he individually places on the land, as life tenant, is cut off by his exercise of the trust power as executor. Thus, in such a case, if the life tenant personally enters into a binding agreement not to build a certain wall on the premises, and later, as executor and donee of the power, executes a deed conveying the land to a purchaser even with notice, the latter takes clear of the agreement. For all that the life tenant held, or could bind, individually, was subject to the exercise of the power. *Hass* v. *Kuhn*, 67 Hun, 435.

§ 573. **Title in trustee—Power in beneficiary.**—The foregoing principles under which the grantee of an absolute power of disposition takes a fee, do not apply where the title is vested in a trustee and a subordinate power is given to the beneficiary under the trust. *Hume* v. *Randall*, 141 N. Y. 499 (504–505 and cases cited). Nor does such a case fall within § 130, above

quoted, where an absolute power of disposition, given to any person to whom no particular estate is limited, results in a fee. For while a present estate is vested in a trustee, a power of disposition in another, subject to the trust, is not an absolute power of disposition while the trust lasts. It is the absence of power in the beneficiary to convey the entire fee, including the present estate, which in such a case prevents the statute from operating to give him a fee. *Asche* v. *Asche*, 113 N. Y. 232 (235–237); *Vernon* v. *Vernon*, 53 N. Y. 351; *Crooke* v. *County of Kings*, 97 N. Y. 421 (435). It would appear, therefore, that *if* it be competent to create a valid trust, with a power in the beneficiary to sell the entire fee absolutely at any time and thus terminate the trust (as to which see remarks of Earl, J., in *Crooke* v. *County of Kings*, 97 N. Y. 446 *et seq.*), the beneficiary would in such case take an absolute fee at testator's death, under Real Prop. L., § 130 (*ante*, § 564). As to a similar beneficial power in the trustee, see *Jones* v. *Newell*, 78 Hun, 290, and *post*, § 577. And as to a similar power in the creator of the trust, even if also the beneficiary, to revoke the trust and resume possession, see *ante*, § 473. See also *post*, § 575.

§ 574. **Mere power and no title.**—If one has an absolute power of disposition, this may give him a fee (*ante*, § 561 *et seq.*), but to effect that result the power must, as in the other cases, be purely beneficial and not accompanied by any trust, *Id.*; *Germond* v. *Jones*, 2 Hill, 569 (574); *Kinnier* v. *Rogers*, 42 N. Y. 531. The fact that land is devised to infant children, that a power would be convenient for purposes of division, and that it is the executors to whom the power is given, may serve to indicate that it was intended to be exercised in trust for the devisees and not for the executors' own interest. *Kinnier* v. *Rogers*, 42 N. Y. 531.

§ 575. **Life estate in devisee—Power in another.**—So where land is devised for life to one, and a power to sell is given to another, *e.g.*, to the executor, this does not change the life estate into a fee. *Matter of Swan*, 60 Hun, 286. See also *ante*, § 573.

§ 576. **Conditional beneficial power.**—" A general and beneficial power may be created subject to a condition precedent or subsequent, and until the power becomes absolutely vested it is not subject to any provision of the last four sections" (*i.e.*, Real Prop. L., §§ 130–133, relating to the effect of certain powers in conferring a fee on the donee). Real Prop. L., § 134. Thus, an absolute power given to a life tenant to dispose of the fee by will *if* she dies without heirs, does not confer a fee. *Taggart* v. *Murray*, 53 N. Y. 233. See also *post*, §§ 577, 579.

§ 577. **Title in life tenant—Power to consume.**—Devises and bequests of property to one for life, with (express or implied) power to dispose of the corpus during his life, for his own benefit, and remainder over of such portion as may be left at his death, have given rise to much litigation. It is settled that such a power and such a remainder are not inconsistent, and while, if the power is absolute, it seems under § 129 (*ante*, § 565) to give a fee, yet by the terms of the same section that fee is subject to any future estates limited thereon if the power is not executed, etc. *Crozier* v. *Bray*, 120 N. Y. 366 ; *Leggett* v. *Firth*, 132 N. Y. 7. And the tenant for life with power to consume, may also be the donee of a power in trust to appoint by will what may be left at his death. *Matter of Gardner*, 69 Hun, 50, aff'd 140 N. Y. 122. Other decisions are *Brown* v. *Farmers' L. & T. Co.*, 51 Hun, 386 (393), aff'd (disregarding this point, the court considering the case as governed by the laws of Rhode Island), 117 N. Y. 266 ; *Wortman* v. *Robinson*, 44 Hun, 357, aff'd 113 N. Y. 628 ; *Getman* v. *McMahon*, 30 Hun, 531 ; *Spencer* v. *Strait*, 38 Hun, 228 ; *Wells* v. *Seeley*, 47 Hun, 109, and cases cited ; *Thomas* v. *Wolford*, 49 Hun, 145 ; *Bell* v. *Warn*, 4 Hun, 406. Compare *Griswold* v. *Warner*, 51 Hun, 12 ; *Flanagan* v. *Flanagan*, 8 Abb. N. C. 413 ; *Colt* v. *Heard*, 10 Hun, 189. An absolute power of disposition, such as to confer a fee on the donee, is not to be derived from a conditional right to consume any part or the whole of the corpus, so far as needed for maintenance, &c., unless it is left to the same person to decide how much is needed for that purpose, *Bundy* v. *Bundy*, 38 N. Y. 410 (421), nor even then if the existence of the necessity, or the donee's decision upon the point, is made a con-

dition precedent to the exercise of the power. *Terry* v. *Wiggins*, 47 N. Y. 512; *Rose* v. *Hatch*, 125 N. Y. 427; *Smith* v. *Van Ostrand*, 64 N. Y. 278; *Ackerman* v. *Gorton*, 67 N. Y. 63; *Campbell* v. *Beaumont*, 91 N. Y. 464; *Swarthout* v. *Ranier*, 143 N. Y. 499; *Cager* v. *Cager*, 111 N. Y. 343; *Douglass* v. *Hazen*, 8 App. Div. 25. In *Jones* v. *Newell*, 78 Hun, 290, a provision was sustained by which the testatrix bequeathed property to A "in trust, however, and for the benefit of B," provided that A might use any or all thereof at his option and for his own personal benefit, at any time before B reached majority. It seems to have been considered that A held in trust, but with the right to consume personally, the beneficial interest of B being confined to surplus income and such of the corpus as might be left at her majority. The case is peculiar. And in *Wright* v. *Miller*, 8 N. Y. 9 (24), where a trustee was given power, with the consent of the donor, to sell, and to apply proceeds to the reasonable support and maintenance of the donor, with remainder over of the residue, if any, the limitation over was held valid. So a power in the donee to dispose of all or any part of the estate if necessary for the care of the legatee for life of a fund, of which the balance, if any, was given over to others, was held not to destroy the remainder, in *Bell* v. *Warn*, 4 Hun, 406.

In *Crozier* v. *Bray*, 120 N. Y. 366 (376) the testator devised a life estate to A, with absolute power to sell, and to consume all the proceeds, with remainder of anything that might be left at her death to B. The court sustained the remainder. In fact A did not exercise the power, and the only actual question was whether the remainder in the land was valid. But it would seem that a remainder in such *proceeds* of a sale as should be left at A's death would be invalid, for the life estate and absolute power to sell and consume without condition would confer a fee subject only to a remainder in case of non-exercise of the power, while, as to proceeds, there could be none except by virtue of the very exercise of the power which must, under the statute, defeat the remainder. *Livingston* v. *Murray*, 68 N. Y. 485 (490–491). In *Leggett* v. *Firth*, 132 N. Y. 7, where there was a similar disposition, the only question actually presented was whether a grantee under the power took a fee. The remainder in the land

was there cut off by an exercise of the power of sale. But while a beneficial life estate and an absolute and beneficial power of disposition, united in the same person, confer a fee, under the statute, subject to a remainder in the land in case of the non-exercise of the power but apparently not to a remainder in the proceeds in case of exercise of the power, it would appear competent to devise a fee, with a remainder limited thereon in the land itself or the proceeds in case of sale, in so far as not consumed by the first taker, the fee thus being a qualified or base fee, and not falling within the statutes under consideration because not involving any life estate at all. See *Matter of Gardner*, 140 N. Y. 122 (126); *Van Horne* v. *Campbell*, 100 N. Y. 287. Where only personal property is involved, the matter is comparatively simple, for in such case the absolute power to consume, if it be a technical power at all, is only "exercised" by actual consumption, and therefore a remainder over of what might be left would be limited to take effect in case of the non-exercise of the power. *Spencer* v. *Straight*, 38 Hun, 228; *Getman* v. *McMahon*, 30 Hun, 531. It is undoubtedly true that many of the cases above cited lay down the doctrine that a life estate in land, coupled with an absolute power to sell, and absolute power to consume the proceeds at will, is consistent with a remainder in the proceeds, if any, not thus consumed—*i.e.*, a reminder to take effect, conditionally, even in case of the exercise of the power to sell. It appears difficult to reconcile these cases with the statute (*ante*, § 564), unless (*a*) upon the theory that the "power" in question is a single power to both sell and consume, and that therefore the remainder in a balance unconsumed may be said to be limited to take effect in case the power (*i.e.*, the double power) is not exercised; or else (*b*) upon the theory that the presence of the contingent remainder in an unexpended balance may create such an interest in a person other than the donee of the power, as to render the power itself one in trust (compare *ante*, 568 *d*), and so render the statutes under consideration inapplicable (*ante*, § 572); *Matter of Gilbert*, 2 Con. 390.

The term "remainder" in the gift over in such cases, may of course refer, as a matter of construction, not to what may be left unconsumed, but to the remainder in a legal sense, *i.e.*, the fee minus the life estate. In the latter case there would be no power

in the life tenant to consume any of the corpus. *Fernbacher* v. *Fernbacher*, 4 Dem. 227. The cases already cited are of course to be distinguished from those where there is a gift in fee, with a repugnant devise or bequest over, and also those where testator attempts to restrict the devisee or legatee in the use of property belonging to himself and not to testator. See *Campbell* v. *Beaumont*, 91 N. Y. 464 ; *Van Horne* v. *Campbell*, 100 N. Y. 287 (relating to a will antedating the Revised Statutes, but discussing the later cases). The right to consume real estate implies the power to sell, and the life tenant can convey a title in fee. *Kendall* v. *Case*, 84 Hun, 124 ; *Colvin* v. *Young*, 81 Hun, 116. See also *Goetz* v. *Ballou*, 64 Hun, 490.

§ 578. **Tenancy in undivided share.**—Where the donee of an absolute power of disposition is a tenant not of the entire estate but of an undivided share thereof, the following points are established : (*a*) If land is given to two persons in fee, as tenants in common, except that if the first to die shall die intestate and without issue he shall then be deemed to have held for life only, and the remainder shall pass absolutely to the other ; and to each is given a power to dispose of the fee in one half by will ; there the two, between them, own the fee, and a conveyance in which they both unite will carry an absolute fee to the purchaser. *Freeborn* v. *Wagner*, 2 Abb Ct. App. Dec. 175. (*b*) If land be given in fee to two or more, as tenants in common, and to one of them is given a general power of sale with direction to hold the proceeds representing the shares of the others, in trust for them, the power does not attach to the share given to the donee, but is absorbed in his fee, but it attaches to the other two thirds. *Hetzel* v. *Barber*, 69 N. Y. 1. (*c*) If land be given to two or more as life tenants in common, and to one be given a testamentary power of disposition over a portion only of his undivided share, the statute does not operate to give him a fee even in that portion of his share, at least where the intent appears that the life tenancy and the modified power of disposition shall not merge to defeat the remainder over in default of testamentary exercise of the power. *Livingston* v. *Murray*, 68 N. Y. 485 (491). But compare *Deegan* v. *Wade*, 144 N. Y. 573 (578). (*d*) But if no such intent appears, and there is an absolute life estate in

an undivided half, and an absolute power in the life tenant to dispose of it all by will, the statute applies, and he may convey that half by grant ; but if he conveys a particular half (having no power to effect a partition), the grantee under the conveyance acquires only what his grantor had in that particular half, namely, a half interest equivalent to one fourth of all. *American Bible Society* v. *Stark*, 45 How. Pr. 160, where the grantee was a volunteer.

§ 579. **Power to sell on consent.**—The fact that a power can only be exercised upon the consent of another, negatives the idea of a fee. *Matter of Frothingham*, 63 Hun, 430 ; *Wright* v. *Miller*, 8 N. Y. 9 (24) ; *Bundy* v. *Bundy*, 38 N. Y. 410 (421) ; (see *Trustees* v. *Kellogg*, 16 N. Y. 83, 88) ; *Ackerman* v. *Gorton*, 67 N. Y. 63 (66). And so if the donee of the power and the beneficiary thereof must unite in the consent. *Wright* v. *Miller*, 8 N. Y. 9 (24) ; *Ackerman* v. *Gorton*, 67 N. Y. 63 (66).

CHAPTER XVII.

POWERS IN TRUST.

§ 580. **Defined.**—See *ante*, § 545.

(1) *When Imperative.*

§ 581. **General principle.**—" A trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled for the benefit of the person interested. A trust power does not cease to be imperative where the grantee has the right to select any, and exclude others, of the persons designated as the beneficiaries of the trust." Real Prop. L., § 137.[1]

Wherever a power or authority is given without limitation, and is not in terms made discretionary, and its exercise is rendered necessary by the scope of the will and its declared purposes, the authority is to be deemed imperative, and a direction will be implied, provided the design and purpose of the testator is unequivocal, and the implication so strong as to leave no substantial doubt, and his intention cannot otherwise be carried out. *Matter of Gantert*, 136 N. Y. 106 (110) ; *Anderson* v. *Davison*, 42 Hun, 431 ; *Holly* v. *Hirsch*, 135 N. Y. 590 (596) ; *Power* v. *Cassidy*, 79 N. Y. 602 (614) ; *Van Boskerck* v. *Herrick*, 65 Barb. R. 250.

§ 582. **Illustrations.**—A testator, William Smith, gave his entire real estate to his only son, Egbert T. Smith, during life, adding the following provision : " With the right and privilege

[1] This section is declaratory of the prior law. *Dominick* v. *Sayre*, 3 Sandf. R. 555. The second sentence was, under the Revised Statutes, a separate section.

of disposing of the same by will or devise to his children, if any he should have, and in case he should die without leaving any children, lawfully begotten, then and in that case I give and devise the same to the children of my daughter Lydia, to them, their heirs and assigns forever." Egbert T. Smith died after testator, leaving children, but not having executed the power. Plaintiff claimed that it passed testator's heirs under an intestacy. "It is not disputed that the authority given to the son to dispose of the estate in remainder to his children constituted a valid trust power. It would have been so regarded under the equitable rules controlling the enforcement of powers, before the adoption of the Revised Statutes; and it fulfils with exactness the definition of a special power in trust embodied in § 95 of the article on powers [Real Prop. L., § 118]. Section 96 [Real Prop. L., § 137] declares that 'Every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity, for the benefit of the parties interested.' All the conditions required to establish an imperative trust power are here presented. Authority to dispose of the property was concededly granted. The beneficiaries were distinctly designated, and there was no express declaration or provision in the grant confiding the execution of the power to the discretion of the donee. The imperative nature of the trust is not destroyed, because the language creating the power is permissive. If the disposing power is given, and it is not coupled with words which expressly, or by necessary implication, make the donee the final arbiter of its exercise, its execution must be decreed. Some positive expression of an intention to make the ultimate conveyance of the property depend upon the volition of the trustee must be found, or there must be annexed to the power some qualification plainly indicating that the donor has substituted the judgment of the donee for his own, for the purpose of determining whether the authorized disposition shall eventually be made." *Smith* v. *Floyd*, 140 N. Y. 337. "Right" and "privilege" are legal equivalents of "power and authority" which have always been held imperative. The fact that in this view a power was useless in the case cited, and a remainder would have been sufficient and simpler, does not shake this principle.

They were alternative methods, and the more indirect was chosen. The omission of a gift over in case of failure to execute the power, if there were children, strengthens this view. *Id.* A general power in executors to sell land, together with a direction to pay debts, is a power in trust in which a creditor, whose debt is directed by the will to be paid, and for the satisfaction of which the personal estate proves insufficient, is beneficially interested, and as to him it is imperative and imposes a duty on the grantee, the performance of which may be compelled in equity for the benefit of such creditor. *Matter of Gantert*, 136 N. Y. 106 (111). The existence of an *imperative* power to sell testator's land to pay debts, deprives a creditor of testator of the remedy by sale of lands under Code Civ. Pr., §§ 2749–2801. *Id.*, p. 110. Under a power in executors to sell "within two years to pay debts and legacies," a failure of the donee to sell within the two years, cannot deprive creditors of their right to enforce a sale thereafter. *Wild* v. *Bergen*, 16 Hun, 127. *Post*, § 586. Such a power in effect makes the creditor a beneficiary under the power, and entitled to demand its execution, and if the debt does not accrue until after the two years, the right to enforce a sale may then be exercised. *Wild* v. *Bergen*, 16 Hun, 127 (129); compare *Cornes* v. *Wilkin*, 79 N. Y. 129. If a power in an executor to sell to pay debts and legacies is peremptory, the surrogate may cite him to account and make distribution. *Bevan* v. *Cooper*, 72 N. Y. 317 (327). A power to sell, though imperative, and effecting an immediate conversion, is not inconsistent with an incidental power, pending sale, to insure, rebuild, repair, exchange gores, etc. *Arnold* v. *Gilbert*, 5 Barb. R. 190.

§ 583. **Enforcement.**—An imperative trust power must be executed justly. *Van Vechten* v. *Van Veghten*, 8 Pai. Ch. 104 (123–124), aff'd 1 Sandf. Ch. 395. If imperative, its performance may be compelled in equity. *Haight* v. *Brisbin*, 96 N. Y. 132; *Manice* v. *Manice*, 43 N. Y. 303 (365); *Matteson* v. *Armstrong*, 11 Hun, 245 (249); *Matter of Hunter*, 3 Redf. 175; *Hancox* v. *Meeker*, 95 N. Y. 528 (535–537). Real Prop. L., §§ 137–143. Where an executor or testamentary trustee is directed and empowered to sell land, and invest the proceeds in trust, and is guilty of gross negligence or bad faith in failing to

sell, an application may be made to the court for his removal, and for an accounting, charging him with the resultant loss. Until these steps are taken, an action cannot be maintained against his sureties. They are not liable until the default of the principal has been duly established. *Haight* v. *Brisbin*, 100 N. Y. 219. See *ante*, § 263 *et seq.* Under an imperative power to sell and pay legacies from the proceeds, the right to the legacies may vest at testator's death, and before actual sale. *Betts* v. *Betts*, 4 Abb. N. C. 317 (387).

(2) *When Discretionary.*

§ 584. **General principles.**—Discretion given to a trustee may rest solely on his own judgment, or it may be subject to control by the court in so far that it must be reasonably exercised. In either case it must not be dishonestly exercised. To the first class belong, for example, cases where an act is to be done only if the particular individual holding the position of trustee shall see fit. *Mason* v. *Mason's Ex'rs*, 4 Sandf. Ch. 623, aff'd 13 Barb. R. 461. To the second class belong all cases where the execution or non-execution of the power is not made expressly to depend on the will of the trustee. To this latter class appear to belong cases where the power is to be exercised if certain facts exist, and the discretion of the trustee is relied on merely to pass on this question of fact. *Ireland* v. *Ireland*, 84 N. Y. 321 ; *Crooke* v. *County of Kings*, 97 N. Y. 421 (443) ; *Holden* v. *Strong*, 116 N. Y. 471 ; *Gladding* v. *Follett*, 2 Dem. 58. Compare *McLean* v. *McLean*, 3 Hun, 395 (aff'd 62 N. Y. 627).

There are no purely discretionary and non-enforceble trust powers, except in cases where express provision to that effect is found in the instrument creating the power. *Tilden* v. *Green*, 130 N. Y. 29 (54). Real Prop. L., § 137. It appears, however, that where a power is reserved this principle is less strictly applied. See *Towler* v. *Towler*, 142 N. Y. 371. If the instrument does, in express terms, render the power purely discretionary, the court is helpless to compel its exercise. *Coleman* v. *Beach*, 97 N. Y. 545 ; *Matter of Bierbaum*, 40 Hun, 504 (506–507). But while equity cannot compel a donee to exercise a trust power which is expressly confided to his sole discretion, to be exercised or not as

he may see fit, yet if he undertakes to exercise it at all, equity at once acquires a certain supervisory control. For the instrument in execution is affected by fraud (*post*, 660 *et seq*), or bad faith. Even the most absolute and sweeping discretion that can be conferred on a trustee, is always subject to the necessity for *bona fides* in its exercise. *Gisborne* v. *Gisborne*, 2 App. Cas. 300 (305); *Tempest* v. *Lord Camoys*, 21 Ch. D. 571 (575, 578); *In re Bryant*, (1894) 1 Ch. 324 (332); *Re Beloved Wilkes' Charity*, 3 MacN. & G. 440 (448). Even in case of absolute discretion the court will interfere if the trustee acts in bad faith. Per Baggalay, J., *In re Gadd*, L. R. 23 Ch. D. 134 (136); *In re Roper's Trusts*, L. R. 11 Ch. D. 272; *In re Hodges*, L. R. 7 Ch. D. 754 (761); *In re Lofthouse*, L. R. 29 Ch. D. 921 (929 bottom, 930 top, 932); *Tabor* v. *Brooks*, L. R. 10 Ch. D. 273 (278); *Marquis Camden* v. *Murray*, L. R. 16 Ch. D. 161 (170). Where there is an absolute discretion in a trustee of a power and he attempts to act at all, his acts must be the result of the exercise of that discretion. The fact that he acts is not enough. Before he acts he must exercise his discretion as to what to do, and then he may act accordingly. *Wilson* v. *Turner*, L. R. 22 Ch. D. 521. So if the trustee does in fact, though not required, set forth the basis of his decision, and it is erroneous, the court will set aside the conclusion. *Re Beloved Wilkes' Charity*, 3 MacN. & G. 440 (448); 1 Lewin on Trusts, 616 sub. 10; *King* v. *Archbishop of Canterbury*, 15 East, 117. The powerlessness of the court to compel the exercise of a purely discretionary power, and its right to control a fraudulent exercise of such a power, rest on the following distinction: that in a case where the donee merely omits to act, he is within his rights; while if he acts corruptly, he is not, in any proper sense, exercising his power, but is doing an injurious act under cover of his position and authority, but not in fact in pursuance of the power given. "It is always a question for the courts to determine whether the action of the trustees in a given case *is within* the discretionary powers given them by the instrument of trust." 2 Perry on Trusts, § 508. The same principle seems to apply, if it is affirmatively proved that the donee's failure to act is fraudulent. 2 Perry on Trusts, § 511. So in general his exercise of the power is subject to all the statutes and principles regulating the exercise of any power,

subject to his discretion within its expressed and legal scope. Most of the powers which are spoken of as discretionary, are so only in the sense that the donee is entrusted with a certain degree of discretion in the first instance, which is not to be interfered with if he displays diligence and good faith. Over all such so-called discretionary powers the court has a supervisory control; which may be called into exercise by proof of neglect or bad faith, *Roosevelt* v. *Roosevelt*, 6 Hun, 31 (42–43), aff'd 64 N. Y. 651; *Haight* v. *Brisbin*, 96 N. Y. 132; *Hancox* v. *Meeker*, 95 N. Y. 528 (535–537), and the courts do not favor a construction which lodges in a donee a wholly arbitrary discretion. *Crooke* v. *County of Kings*, 97 N. Y. 421 (443–444). But if discretion exists in the donee, the court, even when able to coerce its exercise, does not do so in a mere suit for construction, but only in a suit brought directly for that purpose and showing a necessity for judicial intervention. *Gelston* v. *Shields*, 16 Hun, 143 (148), aff'd 78 N. Y. 275 (281). Notice, on the part of a person taking title under a power, that the donee is exercising his discretion in bad faith, will affect the title in his hands. See *Hovey* v. *Chisolm*, 56 Hun, 328. *Post*, § 719. As to a refusal of one of two donees charged with a trust power to sell, to co-operate with his co-donee, see *Gelston* v. *Shields*, 16 Hun, 143 (148), aff'd 78 N. Y. 275 (281). A given grant of power to sell, in general terms, may be construed as *discretionary* for one purpose (as, to sell for the benefit of a trust if deemed best), and *imperative* for another (as, to sell to pay debts not covered by personalty). *Matter of Gantert*, 136 N. Y. 106 (113).

(3) *Imperative with Discretionary Features.*

There are trusts which, while imperative, allow a certain, and sometimes a large, discretion in the donee. Thus:

§ 585. **Power of selection.**—"A trust power does not cease to be imperative where the grantee has the right to select any, and exclude others, of the persons designated as the beneficiaries of the trust." Real Prop. L., § 137; *Power* v. *Cassidy*, 79 N. Y. 602 (613); *Holland* v. *Alcock*, 108 N. Y. 312 (320). This provision just quoted is now the second sentence of the sec-

tion cited, but was, under the Revised Statutes, a separate section. "If the trustee of a power, with the right of selection, dies, leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as beneficiaries of the trust." Real Prop. L., § 140. *Clark* v. *Crego*, 51 N. Y. 646.

In case provision is made by will for certain persons *or* their issue, a radical distinction in construction exists according as the gift is a direct one (in which case the word *or* has a substitutional effect), or is to be exercised through a power of appointment (in which case the tendency is to hold the word *or* as conferring discretion on the donee of the power). For in the first case, there can be no discretion, while in the second, it may be intended to have the donee decide whether to give to the persons named *or* to their issue. So held, where a testator gave to B a power to appoint land to testator's three sisters *or* their issue, and B by her appointment gave it to the issue though the parents were living, and this appointment was sustained. *Drake* v. *Drake*, 134 N. Y. 220; compare *Kane* v. *Astor's Ex'rs*, 9 N. Y. 113.

§ 586. **Discretion as to time, method, etc.**, may also be conferred on the donee of an imperative power. See *post*, Chap. XXI., subd. (1).

CHAPTER XVIII.

THE DONEE OF THE POWER.

§ 587. **The statute.**—" A power may be vested in any person capable in law of holding, but cannot be exercised by a person not capable of transferring real property." Real Prop. L., § 121. As to persons capable of holding and of transferring real property, see *ante*, § 54 *et seq.* and § 107 *et seq.* The fact that the possession of the person creating the power has been merely constructive, *Bliss* v. *Johnson*, 94 N. Y. 235, does not bring a conveyance by the donee within the scope of § 130 of the Penal Code prohibiting conveyances except where the grantor or those through whom he claims, have been in possession for one year. *Wright* v. *Syracuse, Ontario & N. Y. R. R. Co.*, 92 Hun, 32. And see *ante*, § 546.

§ 588. **Married woman.**—" A general and beneficial power may be given to a married woman, to dispose, during her marriage, and without concurrence of her husband, of real property conveyed or devised to her in fee." Real Prop. L., § 122. " A special and beneficial power may be granted, (1) to a married woman, to dispose, during the marriage, and without the concurrence of her husband, of any estate less than a fee, belonging to her, in the property to which the power relates ; or (2). to a *tenant for life*," etc. Real Prop. L., § 123. (As to 2, see *post*, § 589.)[1]

[1] The following sections of the Revised Statutes have been repealed : " When *a married woman*, entitled to an estate in fee, shall be authorized by a power, to dispose of such estate during her marriage, she may, by virtue of such power, create any estate, which she might create if unmarried," 1 R. S. 737, § 130 ; " no power vested in *a married woman*, during her infancy, can be exercised by her, until she attains her full age," 1 R. S. 735, § 111 ; " *a married woman* may execute a power during her marriage, by grant or de-

The statutory grant of testamentary power over personalty to every female not being a married woman, of sixteen years and upward, etc. (2 R. S. 60, § 21), was held by Chancellor Walworth not to apply to exclude the execution of a power by an adult married woman by an instrument in the nature of a will. *Strong* v. *Wilkin*, 1 Barb. Ch. 9 (13). But this view was overruled in *Wadhams* v. *American Home Miss. Soc'y*, 12 N. Y. 415 (423), which held that a married woman's capacity to execute by will a power over real estate, preserved by the Revised Statutes, had no application to personal property. The present statutes relating to the property and testamentary rights of married women, appear to remove all doubts that might have existed, and to establish fully the capacity of a married woman to execute any power as if unmarried. If at the time of delivery of the deed giving a power, the donee (as, formerly, a married woman) could only transfer an equitable title by her testamentary appointment, yet if, before execution of the power that disability ceases, this enables the donee, under the same power, to give a legal as well as an equitable title. *Albrecht* v. *Pell*, 11 Hun, 127.

§ 589. **Life tenant as donee.**—The life tenant may be invested with a power in trust to appoint the remainder by will. So a tenant for life, with power to sell and consume, may be given a power in trust to appoint by will what may be left at his death. *Matter of Gardner*, 69 Hun, 50, aff'd 140 N. Y. 122. Where a life tenant of land has a power to sell it, the remaindermen interested in the proceeds, if cognizant of a sale, would have the right, before the money is paid over, to ask a court of equity to make some condition in the way of securing the safety of the fund before the tenant for life should be allowed to enjoy its

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vise, as may be authorized by the power, without the concurrence of her husband, unless by the terms of the power its execution by her during marriage is expressly or impliedly prohibited." 1 R. S. 735, § 110.

The three preceding sections were not re-enacted by the Real Property Law. But compare Domestic Relations Law, §§ 20, 21. For the decisions on married women as donees of powers, see *Wright* v. *Tallmadge*, 15 N. Y. 307; *Leavitt* v. *Pell*, 25 N. Y. 474; *Crooke* v. *County of Kings*, 97 N. Y. 421; *Jackson* v. *Edwards*, 7 Pai. Ch. 386, aff'd 22 Wend. 498.

actual possession, if there is any doubt about his solvency. And even after the money has been paid over, it seems that a similar remedy may be resorted to. *Matter of Blauvelt*, 131 N. Y. 249 (253–254) ; compare *Matter of Camp*, 126 N. Y. 377. And where the executors are given a power to sell land, receive the proceeds, and pay them over to a life tenant to hold, *semble*, it would be their duty, if there were any doubts of his solvency, to require security. *Matter of Blauvelt*, 131 N. Y. 249 (253).

" A special and beneficial power may be granted : 1. To a married woman [see *ante*, § 588]. . . . 2. To a tenant for life of the real property embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life ; and such power is valid to authorize a lease for that period, but is void as to the excess." Real Prop. L., § 123.

" The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate, and passes by a grant of such estate unless specially excepted. If so excepted, it is extinguished. Such a power may be released by the tenant to a person entitled to an expectant estate in the property, and shall thereupon be extinguished." Real Prop. L., § 135.

" A mortgage executed by a tenant for life, having a power to make leases, does not extinguish or suspend the power ; but the power is bound by the mortgage in the same manner as the real property embraced therein, and the effects on the power of such lien by mortgage are : 1. That the mortgagee is entitled to an execution of the power so far as the satisfaction of his debt requires ; and, 2. That any subsequent estate, created by the owner, in execution of the power, becomes subject to the mortgage as if in terms embraced therein." Real Prop. L., § 136.

§ 590. **Trustee—Beneficiary—Grantor.**—One who is the trustee of an express trust may be also the donee of a power affecting the same property. See *ante*, § 571. The beneficiary of a trust for his own life may also be given a power over the property, *e.g.*, to appoint or dispose of the remainder. This may be either beneficial, *Tweddell* v. *N. Y. Life Ins. & Trust Co.*, 82 Hun, 602 ; *Matter of Vanderbilt*, 20 Hun, 520 ; or in trust, *McCready* v. *Farmers' Loan & Trust Co.*, 70 Hun, 394 (395) ; *Mead* v. *Mitchell*, 17 N. Y. 210 (211) ; *Floyd* v. *Carow*, 88

N. Y. 560. See *ante*, § 573. The creator of a trust may reserve a power, either beneficial or in trust. Real Prop. L., §§ 112, 124, 128. *Post*, Chap. XXIII.

§ 591. **Infant.**—It is to be noticed that the donee of a power over real property cannot exercise it if not capable of transferring real property. *Ante*, § 587. But he may hold such a power. An infant cannot transfer real property by will. 2 R. S. 56, § 1, as amended. But compare, as to trust powers, Real Prop. L., §§ 140–142. In the case of a beneficial power to devise, given to an infant, such that it must be executed by will only, the present law might work great injustice. See Sugden on Powers, Chap. V., § 2, subd. 4. It is proper to withhold from an infant testamentary authority to devise his own land, for upon his death it passes to his heirs. But if he holds a beneficial power to devise, with remainder over to strangers in default of execution, it would seem just to allow the infant to exercise the power, at least in favor of his near relatives. *Id.*

§ 592. **Witness to will.**—The positions of donee of a testamentary power in trust and subscribing witness to the will are not inconsistent, even though the donee is to receive compensation for his services. *Matter of Chase*, 41 Hun, 203 (205) and cases there cited. See *ante*, § 114.

§ 593. **Donee by delegation.**—"A delegated power is an authority which one person transfers to another (and which, in some cases, that other cannot further transfer)." Some powers are inherently incapable of delegation. *Crooke* v. *County of Kings*, 97 N. Y. 421 (441–442). The distinction between such as may, and such as may not, be delegated, has been said, by Earl, J., to depend on the presence or absence of the element of personal discretion vested in the first donee, citing many authorities. *Crooke* v. *County of Kings*, 97 N. Y. 421 (453 *et seq.*); *Coleman* v. *Beach*, 97 N. Y. 545 (559). In the *Crooke* case, *supra*, Earl, J., holds the power there in question to be one which could have been delegated (p. 459), while Finch, J., holds that it was incapable of delegation whether involving trust or confidence or not (p. 442).

In Farwell on Powers (2d ed.), 441, the following rules are laid down, and supported by numerous authorities there examined: (1) "A power involving the exercise of personal discretion by the donee cannot be delegated; *delegatus non potest delegare*," p. 441. "But trustees do not, of course, delegate their powers by consulting with experts, or with their beneficiaries, and by allowing their arguments to influence their conduct." *Id.* (2) "A power to do an act merely ministerial, and involving no personal discretion, may be delegated." *Id.*, p. 445. As to what does, and what does not, constitute an attempt to delegate a power, see *Crooke* v. *County of Kings*, 97 N. Y. 421 (442 *et seq.*). For further illustrations and discussion, see *Berger* v. *Duff*, 4 Johns. Ch. 368; *Newton* v. *Bronson*, 13 N. Y. 587 (593 *et seq.*); *Mayor of N. Y.* v. *Stuyvesant*, 17 N. Y. 34 (42); *Suarez* v. *Pumpelly*, 2 Sandf. Ch. 336.

"Where a power to sell real property is given to a mortgagee, or to the grantee in any other conveyance intended to secure the payment of money, the power is deemed a part of the security, and vests in and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid." Real Prop. L., § 126. See also as to transfer of life tenant's power to lease, *ante*, § 589.

§ 594. **Donee designated by third party.**—The owner of property may not only create a power over it, but he may give to one person power to appoint another to exercise the power in question. Thus he may authorize A to name a third party to sell certain property. *McGrath* v. *Van Stavoren*, 8 Daly, 454.

§ 595. **Co-tenant of testator.**—The fact that the property affected by the power consists of an undivided share in land, another share in which is owned by one of the donees of the power, does not in any way disqualify the latter from joining in the exercise of the power. *Stehlin* v. *Stehlin*, 67 Hun, 110 (114).

§ 596. **Donee under foreign will.**—If a will creating a power of disposition over real property in New York, is made by a person residing elsewhere in the United States, and it has been duly proved, and filed or recorded, where he resided, the Code (§ 2703)

provides for recording the will, or record and proofs, etc., in New York, but does not provide for issuing letters here to the executor named in the will, the provisions for ancillary letters being confined to wills of personal property (Code C. P., § 2695 *et seq.*). It has accordingly been said that if under such a will a power is conferred on executors, the existence of the power may be evidenced here by the record required by § 2703, and may be exercised by the foreign executors, though they hold no ancillary letters. *Pollock* v. *Hooley*, 67 Hun, 370 (377). And it has been held that if such a power be given to a third person not an executor, or to a person who is executor but in his personal and not his executorial capacity, the record here constitutes due evidence of his authority to execute the power. *Id.* See also *Doolittle* v. *Lewis*, 7 Johns. Ch. 45 ; *ante*, § 553.

§ 597. **Successor of donee.**—If the sole or last surviving donee of a power in trust dies, or if such a donee whether sole or not resigns, or is removed, a successor may be appointed by the Supreme Court. Real Prop. L., § 162 ; *Id.*, §§ 91–92. (See *post*, § 604.) See also Real Prop. L., § 140. The statute vesting the title of real property given on a charitable trust, in the Supreme Court, when no trustee is named in the trust instrument (Real Prop. L., § 93), also applies to powers (*Id.*, 162). As to other powers in trust, see Real Prop. L., § 141. As to charitable trusts of personal property, see L. 1893, ch. 701.

Under subdivision 2 of § 92 of the Real Property Law, it is ground for removing a grantee of a power in trust that he improperly refuses to exercise the power, *Oliver* v. *Frisbie*, 3 Dem. 22 ; or that he has employed the power as a means of securing his bondsmen. *Fleet* v. *Simmons*, 3 Dem. 542.

The statutes above cited, authorizing the appointment of a successor, apply, of course, only to such powers as survive the death, resignation or removal of the original donee. If there are two or more donees, and one or more, but not all, die, resign or are removed, these statutes only apply where, in accordance with the intent evinced in the instrument creating the power, or with other statutory provisions, the appointment of an associate to fill the vacancy, is either essential, or permissible. On these points see *ante*, § 126 and *post*, §§ 604, 633 *et seq.*, and compare

as to appointment by the surrogate of a successor to one of two or more executors who has died, or whose letters are revoked, etc., Code C. P., § 2692; or where all have died, etc.; *Id.*, § 2693. And *post*, 633 *et seq.*

§ 598. **Executor as donee.**—If a power is conferred by will on a person who is also made executor, it may, of course, if so intended, be a beneficial power. If given to the executor *eo nomine*, it is presumably to be exercised for the benefit of the estate. *Sweeney* v. *Warren*, 127 N. Y. 426 (434); compare *Forster* v. *Winfield*, 142 N. Y. 327; but this presumption may be offset by evidence of a contrary intent. *Cotton* v. *Burkelman*, 142 N. Y. 160 (163); see *Kinnier* v. *Rogers*, 42 N. Y. 531 (534–535). So if it be in trust, it may be given to the executor as such or in some distinct capacity—a subject considered further on. But if the power is given to him as executor he must qualify as executor before he can execute the power. See *Egerton's Adm'rs* v. *Conklin*, 25 Wend. 224. The letters, when issued, are *prima facie* evidence of his standing as executor. *Roderigas* v. *E. R. S. Inst.*, 63 N. Y. 460; s. c. 76 N. Y. 316; *O'Connor* v. *Huggins*, 113 N. Y. 511; *Kelly* v. *West*, 80 N. Y. 139; *Leonard* v. *C. S. N. Co.*, 84 N. Y. 48; *Power* v. *Speckman*, 126 N. Y. 354.[1]

§ 599. **Inherent in executors.**—There are certain powers, or rather authorities, that may be exercised by executors though not granted by the will. Thus, though the will contains no power of sale, they may sell land bought in by them on foreclosure of a mortgage held by them as executors, the land being regarded as personalty. *Lockman* v. *Reilly*, 95 N. Y. 64 (71); *Valentine* v. *Belden*, 20 Hun, 537. The same result follows if, pending foreclosure, the land is conveyed to them in satisfaction of the mortgage debt. *Cook* v. *Ryan*, 29 Hun, 249, approved, 95 N. Y. 71. As it is personalty, a judgment against the executors does not become a lien on it. *Id.*

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[1] As to the penalty for fraudulent sales of real property by an executor, administrator, etc., notice the fragmentary provision left unrepealed in 2 R. S. 110, § 58, as to which see *Matter of Valentine*, 1 Misc. 491 (493–494), aff'd 71 Hun, 611.

§ 600. **Power in executor—Charge on land.**—A testator may charge both debts and legacies on land, and his intention, duly evidenced, controls. In determining that intent, the fact that he has given his executors power to sell the land may have a bearing. *Hoyt* v. *Hoyt*, 85 N. Y. 142 ; *Le Fevre* v. *Toole*, 84 N. Y. 95 ; *Clift* v. *Moses*, 116 N. Y. 144 (155–156). It is, however, to be noticed that in this respect debts and legacies do not stand on the same footing. Debts are in effect charged on the land any way, by force of the statute, and if the personalty does not suffice, it may be sold under proceedings in the Surrogate's Court. A power of sale, so far as debts are concerned, may have been inserted merely for the purpose of avoiding long and expensive proceedings, in case there should be a deficiency of personal assets. *Clift* v. *Moses*, 116 N. Y. 144 (155–156) ; *Taylor* v. *Dodd*, 58 N. Y. 335 (346) ; *Kinnier* v. *Rogers*, 42 N. Y. 531. Therefore a naked power to sell to pay debts, does not imply a charge of the debts on the land, *Matter of Gantert*, 136 N. Y. 106 (112) ; *Matter of City of Rochester*, 110 N. Y. 159 ; *Matter of Bingham*, 127 N. Y. 296 ; *Matter of Fox*, 52 N. Y. 530 (537) ; and does not change the statutory order of marshalling assets. *Sweeney* v. *Warren*, 127 N. Y. 426 (432) ; *Heermans* v. *Robertson*, 64 N. Y. 332 (341) ; *Matter of Gantert*, 136 N. Y. 106 (111). With legacies it is different. They are payable out of the personal estate, and the real estate cannot be made liable for their payment unless they are charged thereon by the provisions of the will. Words that would indicate an intention to charge legacies upon the real estate might not, therefore, convey any such intention as to debts. As, for instance, the giving of a power of sale to pay legacies, may indicate an intention that they be paid out of the real estate. *Clift* v. *Moses*, 116 N. Y. 144 (155). A mere power to sell, in the executors, not specifying the purpose, does not, *per se*, charge even legacies on the land, *Kinnier* v. *Rogers*, 42 N. Y. 531 ; while, on the other hand, it is not necessary, in order to charge them, to do so in specific terms, nor even to state that the power is to sell *to pay legacies*, if such an intent appear from what is said, *Le Fevre* v. *Toole*, 84 N. Y. 95 ; *Hoyt* v. *Hoyt*, 85 N. Y. 142 ; *Taylor* v. *Dodd*, 58 N. Y. 335 (348) ; *Matter of Vandevort*, 8 App. Div. 341 ; nor even, of course, to create any power at all. The land

may be merely devised to third parties, charged with the legacies. *McCorn* v. *McCorn*, 100 N. Y. 511. Even though the will devises and bequeaths both real and personal property to the executors in trust for the purpose of paying debts and legacies, with power to sell, etc., for that purpose, while this may charge the legacies, it does not charge the debts, on the land. *Clift* v. *Moses*, 116 N. Y. 144 (156).

A question similar to that involving a charge of debts or legacies on land, arises where it is claimed that a power of sale in the executors is such as to equitably convert the land, and thus constitute it a portion of the personal assets in the hands of the executors. To effect such conversion, an intention to do so must appear, and the power must be imperative. *Clift* v. *Moses*, 116 N. Y. 144 (157); if these conditions exist, equitable conversion results. *Fisher* v. *Banta*, 66 N. Y. 468; *Lent* v. *Howard*, 89 N. Y. 169; *Parker* v. *Linden*, 113 N. Y. 28. Where testator charges his debts on all his land, which he also devises to trustees, and gives to the same persons *as executors*, power to sell any or all of it to pay the debts, this charge and power refer to the debts payable by the executors, and do not give to the holder of a mortgage on part of the land devised, any charge on the rest, as against other creditors not secured by mortgage. And this is so though the executors, in their capacity as trustees, hold the legal title, if, as trustees, they have no power to sell. *Van Vechten* v. *Keator*, 63 N. Y. 52.

§ 601. **No charge—Imperative power.**—The foregoing cases relating to the question of a charge on the land are to be distinguished from those where, although there is no charge, the power, being imperative, is held to supply due means to creditors to enforce, through its exercise, and in case of deficiency of personal assets, the payment of debts which the will directs to be paid, and so deprives them of the right to procure a sale under the statute, in proceedings in the Surrogate's Court. The exercise of such a power may be compelled, in case of need. *Matter of Gantert*, 136 N. Y. 106; *Matter of Hesdra*, 2 Con. 514. But the only ground on which it prevents resort to statutory proceedings for sale is that it is adequate, and compulsorily enforceable for the same purpose. No such result, therefore,

will follow, if the power is merely discretionary so that its exercise cannot be compelled, nor if it is limited to some other specific purpose, nor where it could not be exercised without breaking up and destroying the scheme of the will and frustrating the intention of the testator. Code C. P., § 2759, subd. 4. *Matter of Gantert*, 136 N. Y. 106 (111), and cases there cited. And it would appear that the fact that the will itself does or does not also direct the executors to pay the debts, may be controlling, in the absence of other indications of intent, in determining whether the power was (*Matter of Gantert*, 136 N. Y. 106) or was not (*Matter of Heroy*, 67 Hun, 13) intended to be exercised for that particular purpose. It is to be noticed that § 2749 of the Code specifically provides that real property of a decedent may be sold under the statutory proceeding to pay the debts, "except where it is devised, *expressly charged* with the payment of debts," etc. But this term "expressly charged," is not to be understood in its usual sense, for in *Matter of Gantert*, 136 N. Y. 106, where the court refused to order a sale under the statute, and held that the enforcement of the imperative power in the executors was the creditor's proper remedy, they state expressly that the will did not charge the debts on the land. The Code section evidently employs the word "charge," therefore, as synonymous with any testamentary provision by virtue of which the creditor is empowered to enforce the sale of land if needed to satisfy his debt. Even though the debt be not expressly charged on the land, the payment of it, as said by Van Brunt, P. J., *Matter of Heroy*, 67 Hun, 13 (20), may by the will be expressly charged on the executor, to be paid from the proceeds of land if necessary. And either kind of a "charge" ousts jurisdiction of a statutory proceeding for sale. And further, while the section just referred to speaks of land *devised*, *expressly charged* with the payment of debts, as forming the exception to the surrogate's statutory authority to direct a sale, yet by § 2759, it is provided that a decree for sale can be made after it has been proved, among other things, not only that the land was not devised thus charged, but also that the property "is not subject to a valid power of sale for the payment thereof [*i.e.*, of the debts, etc.]; or if so devised *or subject*, that it is not practicable to enforce the charge *or to execute the power*," etc. Code C. P., § 2759,

subd. 4. And while inadequacy of personalty is not suggestive of an intent to charge the realty with the payment of debts, in view of the statute permitting a resort to the realty by creditors, *Matter of City of Rochester*, 110 N. Y. 159, yet it may be indicative of an intent that a general power conferred on executors shall enable and require them to sell to pay debts in case of deficiency, *Matter of Gantert*, 136 N. Y. 106 (109); and may also be indicative of an intention to charge legacies on the land. *Hoyt* v. *Hoyt*, 85 N. Y. 142; *Scott* v. *Stebbins*, 91 N. Y. 605; *McCorn* v. *McCorn*, 100 N. Y. 511; compare *Brill* v. *Wright*, 112 N. Y. 129; *Wiltsie* v. *Shaw*, 100 N. Y. 191; *Bevan* v. *Cooper*, 72 N. Y. 317; *Cahill* v. *Russell*, 140 N. Y. 402. As to whether a deficiency of personal assets exists, such as to warrant a sale of realty to pay debts, either under the statute or under a power in the executor, where the executor has produced a shortage by squandering the assets, compare *Matter of Bingham*, 127 N. Y. 296, with *Kingsland* v. *Murray*, 133 N. Y. 170.

§ 602. **Charge on land—No power.**—As a power to sell to pay debts does not in itself constitute the debts a charge on the land, *ante*, § 601, so the fact that the debts are charged on the land does not in itself imply a power of sale in the executors. *Matter of Fox*, 52 N. Y. 530 (536); *Dill* v. *Wisner*, 88 N. Y. 153 (158). The charge renders a power unnecessary. *Id.*; *Matter of Gantert*, 136 N. Y. 106 (112). But though unnecessary, it is not repugnant. The charge and the power may coexist. And an imperative power to sell to pay *debts charged*, negatives a power in the surrogate to decree a statutory sale to pay debts. *Matter of Rosenfield*, 5 Dem. 251. *Ante*, § 601.

If there be no imperative power of sale, which may be enforced for the payment of debts in case of deficiency of personal assets, and creditors seek to enforce a sale under the statutory proceedings in the Surrogate's Court, it is essential for them to show as a condition precedent that all the personal property of the deceased which could have been applied to the payment of debts and funeral expenses, has been so applied, leaving a deficiency. *Kingsland* v. *Murray*, 133 N. Y. 170. But if a power of sale exists in the executor, to be exercised for the payment of debts in case of deficiency, it appears from the remarks of the

court in *Sweeney* v. *Warren*, 127 N. Y. 426 (431), that the existence of a deficiency as a matter of fact, is not a condition precedent to the valid exercise of the power in selling the land to a purchaser for value without notice ; though if he have notice that no sale is required, the power is defeated, and the heirs or devisees may recover the land from the purchaser. *Id.*

§ 603. **Power—Proceeds as assets.**—The question of the effect of an express power of sale in the executor, coupled with a direction to pay debts or legacies, upon the character of the property as assets in his hands to be accounted for in the Surrogate's Court, has received much discussion. It is held that such a power renders the land equitable assets, *Dill* v. *Wisner*, 88 N. Y. 153 (158) ; and that the proceeds, so far as required, are assets for the payment of debts, legacies and expenses, in excess of the personalty, the balance passing to the devisee, *Erwin* v. *Loper*, 43 N. Y. 521 ; *Matter of Bolton*, 146 N. Y. 257 ; even though the power were merely discretionary, if it has in fact been exercised. *Matter of Gantert*, 136 N. Y. 106 (113) ; *Matter of Powers*, 124 N. Y. 361. Though the power given be not given to pay debts, yet if it has in fact been duly exercised, and irrespective of the purpose for which it was given, the resulting proceeds are in the executors' hands for use in paying debts in excess of the personal estate, and may also be used by the executors to reimburse themselves for any such excess paid by them, *Matter of Bolton*, 146 N. Y. 257, and cases cited. And this is so though the lands are devised to the executors in trust and they thus hold them in a capacity distinct from that of the executorship. If they sell, as trustees, the proceeds become assets in their hands as executors, so far as required to satisfy debts of the testator, *Glacius* v. *Fogel*, 88 N. Y. 434. The fact that the land has been duly sold, and the proceeds have been received, cuts off the possibility of reaching the land itself, and the only resort left to the creditor is a proceeding for an accounting as to the fund. *Matter of Bolton*, 146 N. Y. 257. And so even before actual sale, the court may determine, on the question of construction, that the will authorizes a sale (irrespective of the purpose), in which case, if the executor then sells, the proceeds will be rendered available, so far as required, according

to due order of marshaling, for the general purposes of administration. *Cahill* v. *Russell*, 140 N. Y. 402. Compare *Matter of McComb*, 117 N. Y. 378; *Hood* v. *Hood*, 85 N. Y. 561.

Where land is disposed of under a power in the executor the surrogate may—one year after letters issued—compel account of the proceeds. Code C. P., § 2726. This covers both sales which effect a conversion into personal assets, and those where the proceeds retain the character of realty. In the latter case, the section does not render them subject to treatment as personal assets, in the Surrogate's Court. They are to be accounted for; but they are not, for example, to be used to make up a deficiency of personal assets for payment of debts, in exoneration of other realty. *Matter of McComb*, 117 N. Y. 378; see *Matter of Blauvelt*, 60 Hun, 394, reversed 131 N. Y. 249. But the surrogate may decree distribution thereof, *Myers* v. *Bolton*, 70 Hun, 367 (369). See *Matter of Bolton*, 146 N. Y. 257. Other cases bearing on this point are, *Matter of Hunter*, 3 Redf. 175; *Matter of Valentine*, 1 Misc. 491 (493), aff'd 71 Hun, 611; *Bloodgood* v. *Bruen*, 2 Bradf. 8; *Matter of Vandervoort*, 1 Redf. 270; *Matter of Place*, 1 Redf. 276; *Lynch* v. *Patchen*, 3 Dem. 58; *Stagg* v. *Jackson*, 1 N. Y. 206. Also *ante*, § 225 (2) (*a*).

If the power be held by the executor, but not in his capacity as such, he cannot be called on to account for the proceeds as assets of the estate, and as executor cannot claim commissions thereon. *Matter of Brown*, 5 Dem. 223. And the same result follows where the power is to manage, *e.g.*, a factory; the machinery goes with the factory, and does not constitute an asset, *Downing* v. *Marshall*, 1 Abb. Ct. App. Dec. 525 (535); see s. c. 4 *Id.* 662. Compare Code C. P., § 2712, subd. 4. The devisee of land subject to a power in the executor to sell to pay debts, may call for an accounting, in order to ascertain his interest. *Carroll* v. *Carroll*, 11 Barb. R. 293. And if under such a power the executor sells to himself, the land may be resold to pay debts if required. *Conger* v. *Ring*, 11 Barb. R. 356. A general and unlimited power in executors, to sell, would, it seems, authorize a sale to effect distribution, to avoid the expense of partition. *Lindo* v. *Murray*, 91 Hun, 335 (337).[1]

[1] In the enumeration of things deemed assets, which go to the executor, to be applied and distributed as part of the personal property of the testator,

§ 604. **Executorial, trust, or personal capacity.**—It not infrequently happens that a power in trust is conferred by will upon the same person who is named as executor; and sometimes this same person may also be constituted by the same will the trustee of an express trust. In such cases it is often extremely difficult to determine the particular capacity in which he holds the power. The question is of importance not only in deciding on the form of execution, which can readily be so effected as to render the distinction immaterial, but also in passing on the validity of a given exercise of the power after its execution, and chiefly in determining whether, if the executorship or the trusteeship has become vacant by death or otherwise, the power thereby is extinguished, or, if not extinguished, by whom it is thereafter to be exercised. It will be seen that testator might confer the power (1) on the individual, irrespective of his executorship or trusteeship, in all senses as if he were a different person; or (2) on the trustee, as such, irrespective of his executorship, in all senses as if he were not also the executor; or (3) on the executor, as such, irrespective of his trusteeship, in all senses as if he were not also the trustee. And which of these courses it is that has in fact been adopted in any given case, is largely a question of construction, to be determined by a consideration of the entire instrument under the guidance of certain general principles.

The authorities appear to leave some phases of the matter involved in uncertainty. Before examining them, it is first to be noticed that a good many of the cases deal with a question which, while bearing a certain superficial resemblance to that under consideration, is really quite distinct; so that though sometimes cited on the present point, they really have little or nothing to do with it. These are cases where the court is asked to determine not which one of several capacities it is in which the power is held, but merely whether or not it is so far strictly personal to the grantee that it must be exercised by him individually or not at all, so that if he dies, the power dies; and where that question is the only one raised, considered and determined. That a

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and to be included in the inventory, is an "interest in lands devised to an executor for a term of years for the payment of debts." Code C. P., § 2712, subd. 3.

power in trust may be thus confided to an individual, either as individual, or as executor, or as trustee, so that, even though a power in trust, it must be executed by him and by no one else (and in some cases even by him only while he continues to act as executor, or as trustee), is well settled. It is a question of the intention as expressed in the trust instrument. *Matter of Blauvelt*, 131 N. Y. 249 ; *Bain* v. *Matteson*, 54 N. Y. 663 (668) ; *Beekman* v. *Bonsor*, 23 N. Y. 298 (303) ; *Lahey* v. *Kortright*, 132 N. Y. 450 (456) ; *Coleman* v. *Beach*, 97 N. Y. 545 ; *Hull* v. *Hull*, 24 N. Y. 647 ; *Royce* v. *Adams*, 123 N. Y. 402 ; *Kortright* v. *Storminger*, 49 Hun, 249 (252) ; *Kilburn* v. *See*, 1 Dem. 353 ; *Matter of Bierbaum*, 40 Hun, 504. The mere fact that the exercise of the power calls for the exercise of discretion does not necessarily lead to this result. *Cooke* v. *Platt*, 98 N. Y. 35 (39) ; *Rogers* v. *Rogers*, 111 N. Y. 228 (238). And a power coupled with a trust survives the donee, and passes to a successor in the trust. *Lahey* v. *Kortright*, 132 N. Y. 450 (456). And when the question presented is merely whether a given case does or does not fall within this class, the decision can hardly be looked to for a definite decision of the rule of succession, as among (1) a successor in the executorship (*i.e.*, an administrator with the will annexed to be appointed by the surrogate) ; see *Greenland* v. *Waddell*, 116 N. Y. 234 (243) ; (2) a successor in the trusteeship (*i.e.*, a successor in the express trust, to be appointed either by the surrogate, under Code C. P., §§ 2818, 2514, subd. 6 ; or by the Supreme Court, either under Real Prop. L., §§ 91, 92, or by virtue of its inherent jurisdiction over trusts and trustees, Constitution, Art. VI., § 1 ; Art. 1, § 16. Code C. P., § 217) ; *Greenland* v. *Waddell*, 116 N. Y. 234 (243) ; and (3) a successor in the execution of the power alone, as such (*i.e.*, a successor of the grantee of the power, to be appointed by the Supreme Court, under Real Prop. L., § 162). For in cases of the class under consideration, the court either decides that the power was strictly personal, in which case there can be no question of succession, or, if it finds that the power was not thus purely personal, it may sustain the power in one successor or another, without discussing or passing on any question as between different successors because no such question was raised. Examples may be found in the cases above cited, and in *Farrar* v. *McCue*, 89 N. Y. 139 (144) ;

Delaney v. *McCormack*, 88 N. Y. 174. The fact that a donee of a power such that it must be exercised by him personally, if at all, becomes insane before executing it, would not obviate the results of the omission. See *Hellenberg* v. *District No. One &c.*, 94 N. Y. 580 (587).

There are other cases, however, where the question is squarely presented whether the power was vested in the grantee thereof merely as such, or in the same person distinctively as executor, or in the same person distinctively as the trustee of an express trust, and where, in general, the practical consideration relates to the particular person who succeeds to it in case of vacancy—whether a successor in the power merely, or a successor in the executorship, or a successor in the express trust. These cases may be conveniently grouped in two classes : (1) those where the decision lay between the successor of the grantee of the power on the one hand, and the successor in either the express trust or executorship on the other ; and (2) those where the decision lay between the successor in the executorship on the one hand, and the successor in the express trust on the other. In considering these two classes it is to be observed that the terms employed by the courts are sometimes ambiguous. Thus, in speaking of a power granted to one irrespective of his occupancy of the trusteeship or the executorship, they say that it is conferred on him "individually ;" this does not necessarily imply that it is so exclusively personal as to be incapable of passing to any successor, but only that he holds it merely as donee, and not as trustee or executor. Again, in distinguishing between such a power and a power in the executor, they speak of the donee as a "trustee ;" that is, as against the executor, he is a trustee of a trust power ; the term trustee in this connection does not refer to the trustee of an express trust, but to the trustee of a trust power. The facts of the given cases indicate the sense in which these terms are employed.

§ 605. **Power in donee as such.**—The cases where the courts have held that the power though vested in the person who was also executor, or executor and trustee, was distinct from those capacities, and was held by the grantee merely as such, and not as executor or as trustee, illustrate various phases of the subject.

Pollock v. *Hooley*, 67 Hun, 370 (377–378) ; *Mott* v. *Ackerman*, 92 N. Y. 539 ; *Matter of Vandervoort*, 1 Redf. 270 (275). Thus, if a discretionary trust power of sale is given to one of two executors, and the land affected by it is devised to him for life, he does not hold the power as executor, but merely in his separate capacity as donee of the power. *Matter of Blauvelt*, 131 N. Y. 249. So where the power is discretionary, and there is no express trust, so that the power must be held by the donee merely as such or else as executor, the general principle (*post*, § 607) that a discretionary power never vests in the executor as such controls, and the power, if capable of devolution, as it may be though discretionary, passes not to an administrator with the will annexed, but to a successor in the power, to be appointed by the Supreme Court. *Cooke* v. *Platt*, 98 N. Y. 35 ; see *Whitlock* v. *Washburn*, 62 Hun, 369, 371.

§ 606. **Power in executor as such.**—Where the same person is executor and also trustee of an express trust, and a power is also conferred, the principle which governs the question whether it vests in the executor as such, or in the trustee as such, is thus stated in *Mott* v. *Ackerman*, 92 N. Y. 539 (553–554) : " Where a power of sale is given to executors for the purpose of paying debts and legacies, or either, and especially where there is an equitable conversion of land into money for the purpose of such payment and for distribution, and the power of sale is imperative and does not grow out of a personal discretion confided to the individual, such power belongs to the office of executor, and under the statute (2 R. S. 72, § 22) passes to and may be exercised by the administrator with the will annexed." (The section cited, 2 R. S. 72, § 22, provided that " In all cases where letters of administration with the will annexed, shall be granted, the will of the deceased shall be observed and performed ; and the administrators with such will, shall have the rights and powers, and be subject to the same duties, as if they had been named executors in such will." This is now repealed, but substantially re-enacted in Code C. P., § 2613.) Also *Greenland* v. *Waddell*, 116 N. Y. 234 (241 and cases there cited) ; *Bain* v. *Matteson*, 54 N. Y. 663 ; *Glacius* v. *Fogel*, 88 N. Y. 434 ; *Van Vechten* v. *Keator*, 63 N. Y. 52 ; *Oliver* v. *Frisbie*, 3 Dem. 22 (26) ; *Fish*

v. *Coster*, 28 Hun, 64, aff'd 92 N. Y. 627 ; *Bingham* v. *Jones*, 25 Hun, 6 (10) ; *Farmers' L. & T. Co.* v. *Eno*, 21 Abb. N. C. 219 (225). This principle, however, cannot be also read conversely, as meaning that if it *is* imperative, it *must* be executed only by the administrator with the will annexed. For if the executor be also trustee, the power, though imperative, must, under some circumstances, be executed by his successor in the trust and not by his successor in the executorship, as set forth in § 607, *post*. The *dicta* in the case of *Roome* v. *Philips*, 27 N. Y. 357, concerning the lack of authority in an administrator with the will annexed, must be confined within the limits laid down in the authorities above cited. If the power be both imperative and intended in furtherance of executorial duties, it devolves on the administrator with the will annexed. Cases cited above. Where a testator devises land to his executors, with a power to sell in order to distribute, and the directions are such as to effect an equitable conversion, the title to the property (as personalty) vests in the executors, as such, by operation of law ; and to accomplish the purpose of the imperative direction in the will, it is within their power, and is imposed on them as a duty, by virtue of their office as executors, to execute the power of sale. The proceeds, when received by them, would be legal assets in their hands for which they would be required to account. And all this is so though they are directed to hold a portion as trustees on a trust to receive and pay over rents. And a successor as *trustee* cannot execute the power. To do so, he must succeed as administrator with the will annexed. *Greenland* v. *Waddell*, 116 N. Y. 234 (240–241) and cases there cited. Executors selling as such, under a power, land of which testator was in reality only trustee, are liable as executors to the real owner, for proceeds received. *Wall* v. *Kellogg's Ex'rs*, 16 N. Y. 385.

§ 607. **Power in trustee as such.**—In *Cooke* v. *Platt*, 98 N. Y. 35, the court say : "The point must now be deemed to be settled that an administrator with the will annexed cannot execute a *discretionary* power of sale vested in executors. He succeeds to the power of sale given to the executor, only when the direction to sell is imperative." Also *Mott* v. *Ackerman*,

92 N. Y. 539 (553); *Greenland* v. *Waddell*, 116 N. Y. 234 (241 and cases there cited); *Bain* v. *Matteson*, 54 N. Y. 663; *Paret* v. *Keneally*, 30 Hun, 15. A power of sale given in terms to "executors" (where the same persons are by the will appointed both as executors and as trustees) is to be exercised by trustees duly appointed successors, though they are not also administrators, if it appears from the will that the power was given to the executors in their capacity as trustees, and concerned the purposes and administration of the trust. *Lahey* v. *Kortright*, 132 N. Y. 450; *Greenland* v. *Waddell*, 116 N. Y. 234 (241 *et seq.*); *Cooke* v. *Platt*, 98 N. Y. 35; *Dunning* v. *Ocean Nat. Bank*, 61 N. Y. 497; *Leggett* v. *Hunter*, 19 N. Y. 445; *Kortright* v. *Storminger*, 49 Hun, 249; *Matter of Paton*, 41 Hun, 497 (501), aff'd, 111 N. Y. 480 (487). And this result follows where the power does not concern the mere administration of the executorial duties, but does concern those of the express trust. *Id.* and *Mott* v. *Ackerman*, 92 N. Y. 539. While there may be a mere naked power in executors to sell land for the purpose of administering the estate, personal in character, and not exercisable by others, the fact that the will also creates a trust, vesting title in the executors as trustees, and that the power relates to the due administration of the trust, presents a different situation, and the power may be exercised by the successors of the trustees. *Lahey* v. *Kortright*, 132 N. Y. 450; compare with *Van Vechten* v. *Keator*, 63 N. Y. 52, where a power given to the executor to sell to pay debts charged on the land, was held not to authorize him to sell to pay a mortgage debt for which decedent's estate was not (as against heirs or devisees) liable, though the executor was vested with the title as trustee. As trustee he held an estate subject to the mortgage, but held no power; as executor he had a power, but was not liable to pay off the mortgage.

The same distinction is illustrated where the same person is executor and also trustee, and in the latter capacity has a power of sale; and two successors are appointed, one an administrator with the will annexed (as successor to the executor), and one as a trustee (as successor in the trust); if the latter executes the power, he is entitled to commissions on the proceeds, but the administrator although he joins, unnecessarily, in executing the

deed, is not so entitled. See *Matter of Paton*, 41 Hun, 497 (501), aff'd, 111 N. Y. 480 (487–488).[1]

§ 608. **Donee's insurable interest.**—It would appear that the donee of a power to hold and care for land, rent it and keep it insured, has an insurable interest. In the case below cited it is stated that the insured had agreed *for a consideration* to do those things; his insurable interest is stated to arise out of his possible liability. Apparently the donee of a power might be liable, though no consideration had passed to him. If any consideration is requisite, the reliance of the donor, and the acceptance of the trust power would appear to furnish it for this purpose, even though the trust power were not coupled with an interest in any other sense. See *Petrie* v. *P. Ins. Co.*, 132 N. Y. 137 and cases there cited.

§ 609. **No donee named.**—"Where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution devolves on the Supreme Court." Real Prop. L., § 141. This provision is not to be understood literally. The designation need not be express, *Meakings* v. *Cromwell*, 5 N. Y. 136 (139), and in one large and important class of cases, where no person is specifically designated in connection with the execution of the power created, it frequently happens that the execution does not devolve on the court, and yet does not fail for lack of a designated donee. This is the class where an executor is named in the will. In such case the power may devolve on the executor. *Officer* v. *Board of H. M.*, 47 Hun, 352; *Bogert* v. *Hertell*, 4 Hill, 492 (500); *Dorland* v. *Dorland*, 2 Barb. R. 63 (80). If this rule last stated were an arbitrary one, with no exceptions, the statute above quoted would be practically a nullity. For it applies, by its terms, only to powers created by will; and a will which names no executor is a great rarity. The statute would be confined to cases where no executor was named, or where, being named, he refused to act.

[1] As to executor or administrator as trustee of lands to a deed of which decedent was entitled, the deed being undelivered at his death, see Code C. P., § 1473. As to recovery of costs and expenses of action by executor, administrator or other trustee, against the beneficiary, see Code C. P., § 1916.

But the rule is not so sweeping as that. It rests on the theory that where there is a testamentary power to be exercised in furtherance of the duties of the executor as such, the court will imply an intention of the testator to have it exercised by the executor as such. It is thus a mere formulation, for a particular class of cases, of the general principle that the designation of a donee may be implied as well as express, and does not have the same scope as the English rule that "if there is a direction to sell in a will, but the testator does not say by whom the sale is to be made, the executor is presumed to be intended, unless a contrary intention appear from the will." Farwell on Powers (2d ed.), 69, 70. It thus applies where there is a direction to sell lands for the payment of debts, or of legacies, or to raise a fund to be distributed by the executors as such, *Meakings* v. *Cromwell*, 5 N. Y. 136, and apparently in other cases, if any, falling within the reason of the rule. Under this principle, the view of the Vice-Chancellor in *Crocheron* v. *Jaques*, 3 Edw. Ch. 207 (211), would seem erroneous, unless it is distinguished by the fact that the land was devised by the will, subject to the power, which distinction is hinted at but not passed on in *Meakings* v. *Cromwell*, *supra*, as to which see Farwell on Powers (2d ed.), 71–72; *Mapes* v. *Tyler*, 43 Barb. R. 421; *Matter of Kick*, 11 State Rep. 692. If neither donee nor executor be named, or if, an executor being named, there is no ground for raising an implied designation of him as the donee, the execution of the power devolves on the Supreme Court, *People* v. *Scott*, 8 Hun, 566 (568); so where executors named refuse to qualify. *Ross* v. *Roberts*, 2 Hun, 90, aff'd 63 N. Y. 652.

CHAPTER XIX.

THE BENEFICIARY OF THE POWER.

§ 610. **Capacity to take.**—"An estate or interest cannot be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power." Real Prop. L., § 159.

§ 611. **By donee to himself.**—If an executor executes a power of sale by conveying to himself, the act is voidable, but may be ratified. But the mere lapse of time, less than twenty years, will not confirm the title. *People* v. *Open Board of S. B. B. Co.*, 92 N. Y. 98. And even that length of time is not necessarily conclusive. *Id.*, and cases cited; *O'Flynn* v. *Powers*, 136 N. Y. 412 (423). The same principle applies to any one holding a power of sale in trust. *Boerum* v. *Schenck*, 41 N. Y. 182; *Campbell* v. *Johnston*, 1 Sandf. Ch. 148. But a beneficial power may of course, by its very nature, be exercised for the donee's own benefit, as to pay his debts, *Betts* v. *Betts*, 4 Abb. N. C. 317 (389 *et seq.*), and, if also general, by a conveyance to himself. *Hubbard* v. *Gilbert*, 25 Hun, 596. See *ante*, p. 139, note.

§ 612. **Selective power.**—Where the persons among whom, or to some of whom, a disposition is authorized either by the instrument creating the power, or by the operation of the statute (Real Prop. L., § 138), are designated, the power is termed "selective." *Austin* v. *Oakes*, 117 N. Y. 577 (590). As to these powers the statute provides that "Where a disposition under a power is directed to be made to, or among, or between, two or more persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion; but when the terms of the power import

that the estate or fund is to be distributed among the persons so designated, in such manner or proportions as the grantee of the power thinks proper, the grantee may allot the whole to any one or more of such persons in exclusion of the others." Real Prop. L., § 138. But in order to fall within the terms of the latter part of this section it must be clear that the intent was to leave the matter of proportions to the determination of the donee of the power. *Matter of Conner*, 6 App. Div. 594; *Jones* v. *Jones*, 8 Misc. 660. "If the trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as beneficiaries of the trust." Real Prop. L., § 140. Referring to the sections above quoted, the revisers of 1830 say: "They are intended to prevent the interference of equity, in correcting what are called *illusory* appointments—a jurisdiction very questionable in itself, and of which the limits are still uncertain. When a fund is directed to be distributed among several persons, in such sums or proportions as the trustee of the power may think proper, it has been decided that each person is entitled to a share, but at law the power is held to be well executed, if any share, however trifling, is allotted to each. A different rule, however, was established in equity. It was there decided, that each person was entitled to a substantial share; and that a distribution allotting a nominal sum to one or more of the objects of the trust, was illusory and void. 'In the meanwhile' (we copy the observations of Mr. Humphreys), 'the question soon arose, what was a substantial share? It was, however, more readily raised than answered, and finding the principle untenable, or at least the rule impracticable, but deeming it too late to abandon an established doctrine, courts of equity have remeasured their steps; and having decided on one occasion that a 190th share was unsubstantial, the actual rule appears to be that any gift short of that proportion (in one case a 122d part) is not illusory.' (Humphreys on Real Property, p. 96.)"

§ 613. Power to convey to remaindermen.—The cases where a trust is created, together with a power to convey the remainder or reversion at the termination of the trust, have given rise to many difficult questions. In some of them, the trust in-

strument is a deed, and in others, a will ; in some, the persons to whom conveyance is to be made are specifically designated, and in others, they are so described as to be ascertainable only upon the termination of the trust ; in some, there is a direct devise or grant in remainder, coupled with a power to convey to such devisees or grantees, and in others the only provision relating to a remainder or reversion is found in the direction to convey. Apart from these variations in the instruments themselves, particular attention is to be paid to the form in which the questions involved have come before the courts. For in some cases, the question is, whether the remainder or reversion vests, during the pendency of the trust, and if so, whether it vests absolutely or defeasibly ; while in others, the question is, whether the persons who will, or who may, become entitled on the termination of the trust, are necessary parties in given actions relating to the land—a question which does not necessarily turn on the distinction between vested and contingent estates. *Campbell* v. *Stokes*, 142 N. Y. 23 (30).

§ 614. **Power to pay, divide or convey.**—In personal property, where there is no gift except such as is found in a direction to executors or trustees to divide or pay at a future time, the vesting in the legatee will not take place until that time arrives. *Shipman* v. *Rollins*, 98 N. Y. 311 (327) ; *Smith* v. *Edwards*, 88 N. Y. 92 ; *Greenland* v. *Waddell*, 116 N. Y. 234 (244) ; *Delafield* v. *Shipman*, 103 N. Y. 463 (468) ; *Drake* v. *Pell*, 4 Edw. Ch. 251 (268) ; *Leake* v. *Robinson*, 2 Merivale, 363 (385 *et seq.*) ; *Vincent* v. *Newhouse*, 83 N. Y. 505 (511) ; *Matter of Baer*, 147 N. Y. 348 ; *Matter of Seaman*, 147 N. Y. 69. But where there is a direct bequest, or even where there is no direct bequest but, in its entirety, the will shows an intent to effect present vesting, it cannot of course be said that there is "no gift except in the direction to divide or pay." The intent controls, and the gift vests, either absolutely or defeasibly. *Bowditch* v. *Ayrault*, 138 N. Y. 222 (229) ; *Matter of Seebeck*, 140 N. Y. 241 ; *Kilpatrick* v. *Barron*, 125 N. Y. 751 (754) ; *Matter of Tienken*, 131 N. Y. 391 (409) ; *Matter of Young*, 145 N. Y. 535 ; *Miller* v. *Gilbert*, 144 N. Y. 68 (73) ; *Campbell* v. *Stokes*, 142 N. Y. 23 ; *Matter of Seaman*, 147 N. Y. 69 (74) ; *Goebel* v.

Wolf, 113 N. Y. 405 (413, 415); *Warner* v. *Durant*, 76 N. Y. 133; *Matter of Mahan*, 98 N. Y. 372 (376); see also *Dorland* v. *Dorland*, 2 Barb. R. 63 (82). These rules, in so far as applied to personalty, do not, or do not usually involve any *power* in a technical and proper sense, as the payment or division required may be effected under the ordinary powers of the executor or trustee; but if the property involved is land, and the direction is to sell it and make a future division or payment of the converted proceeds, a power of sale is necessarily involved, and in such a case the rules already stated also apply, *Bowditch* v. *Ayrault*, 138 N. Y. 222; *Matter of Young*, 145 N. Y. 535 (538); *Ross* v. *Roberts*, 2 Hun, 90, aff'd 63 N. Y. 652; as they do likewise where there is a power to receive and apply rents, *Matter of Seebeck*, 140 N. Y. 241; and also where there is a power, at a future time, to *convey* land to the persons entitled. *Matter of Seaman*, 147 N. Y. 69 (74); *Campbell* v. *Stokes*, 142 N. Y. 23; 1 R. S. 773, § 2; *Goebel* v. *Wolf*, 113 N. Y. 405 (412).

And if, apart from the existence of a power to convey, a given remainder would be a vested one, the presence of a power to convey to the remaindermen does not interfere with its vested character. *Moore* v. *Appleby*, 36 Hun, 368, aff'd 108 N. Y. 237; *Campbell* v. *Stokes*, 142 N. Y. 23; *Matter of Tienken*, 131 N. Y. 391 (402, 404 *et seq.*); *Gilman* v. *Reddington*, 24 N. Y. 9 (15, 16); *Goebel* v. *Wolf*, 113 N. Y. 405; *Van Axte* v. *Fisher*, 117 N. Y. 401; *Stevenson* v. *Lesley*, 70 N. Y. 512; *Knowlton* v. *Atkins*, 134 N. Y. 313 (317); *Williamson* v. *Field*, 2 Sandf. Ch. 533 (562); *Levy* v. *Levy*, 79 Hun, 290.

So "The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power." Real Prop. L., § 31.

But if the persons to whom or for whose benefit a conveyance or appointment is to be made under a power in trust are unascertainable until the end of the trust term, this fact, but not the presence of the power to convey or appoint, renders the estate to be conveyed or appointed *to them* contingent, *Townshend* v. *Frommer*, 125 N. Y. 446 (467), which case may to this extent be safely cited as an authority (although there the power was created by deed, and the future estate was not a remainder but a reversion), see the discussion in *Haynes* v. *Sherman*, 117 N. Y.

433 (438–439); *U. S. Trust Co.* v. *Roche*, 116 N. Y. 120; if, indeed, in such a case the future estate be a remainder at all, *U. S. Trust Co.* v. *Roche*, 116 N. Y. 120 (130). But in general the case of *Townshend* v. *Frommer*, 125 N. Y. 446, must be regarded as highly peculiar, and be treated with caution. *Campbell* v. *Stokes*, 142 N. Y. 23; note, 26 Abb. N. C. 465; *Levy* v. *Levy*, 79 Hun, 290. Where there is a power to sell at the end of a trust term, and distribute the proceeds, this power, though imperative, does not necessarily interfere with the vesting of the remainder pending the precedent estate, but, if intended as a direction and authority given for the purpose of convenience of division, the remaindermen take, at testator's death, a vested remainder in fee. *Matter of Tienken*, 131 N. Y. 391 (408); *Miller* v. *Gilbert*, 144 N. Y. 68 (74–75); *Van Axte* v. *Fisher*, 117 N. Y. 401 (403). So with a power to sell and distribute with a direction to postpone sale till the end of a designated life. *Tucker* v. *Ball*, 1 Barb. R. 94. The exercise of a power to convey at the end of a trust term to persons previously, or only then, ascertained, is unessential to the vesting of title. The remainder would vest, either at testator's death, or at the end of the trust, even if the power were not exercised. Real Prop. L., § 89. *Bruner* v. *Meigs*, 64 N. Y. 506 (516); *Matter of Livingston*, 34 N. Y. 555 (567); *Watkins* v. *Reynolds*, 123 N. Y. 211 (217); *Williamson* v. *Field*, 2 Sandf. Ch. 533 (562); *Campbell* v. *Low*, 9 Barb. R. 585 (594); compare the peculiar case of *Townshend* v. *Frommer*, 125 N. Y. 446 (467), as to which see remarks *supra*. A trust created for the grantor's life, with direction "after his death to pay over and transfer" the corpus to the grantor's surviving children, ceases immediately on grantor's death. In an action for partition, then pending, brought by the trustee, he ceases to have any interest; and the children of the grantor are necessary parties. *Miller* v. *Wright*, 109 N. Y. 194. And where power is conferred on executors and trustees to appoint commissioners to partition and to convey the shares to the trustees to be held in trust, the trustees take directly under the will and not under the conveyances from the commissioners. *Whitney* v. *Phœnix*, 4 Redf. 180. And where the trust instrument, instead of creating in terms a power to convey, attempts to grant or devise lands to a trustee in trust to convey (a purpose

for which an express trust is not authorized), the lands vest in the persons to whom conveyance is directed, under the statute providing that "every disposition of real property, whether by deed or by devise, shall be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to another to the use of, or in trust for, such person; and if made to any person to the use of, or in trust for another, no estate or interest, legal or equitable, vests in the trustee. . . ." Real Prop. L., § 73; also *Id.*, § 72; *Adams* v. *Perry*, 43 N. Y. 487 (496). Compare, as to the application to remainders, the peculiar case of *Townshend* v. *Frommer*, 125 N. Y. 446 (462 *et seq.*, 467) which, if intended to convey the idea that a mere power to convey a future estate which, apart from the power, would be vested in interest pending the precedent estate, has any operation to render the same contingent, is certainly inconsistent with a long and otherwise unbroken line of prior and subsequent authorities, and is to be disregarded. See *Campbell* v. *Stokes*, 142 N. Y. 23 (30); *Levy* v. *Levy*, 79 Hun, 290; see Real Prop. L., § 31. If, in the case of a devise to trustees, for a legal term, and then in trust to convey, the remaindermen are unascertainable until the time for the conveyance arrives, it was held in *Nathan* v. *Hendricks*, 87 Hun, 483, that the fee, in the mean time, vests in the trustees. It is difficult to perceive the theory on which this holding rests. A trustee never takes a fee except in the case of a trust to sell to pay debts, or a trust to sell, mortgage or lease to pay legacies, etc. A trust to convey does not fall within any one of the four permitted classes of express trusts. If attempted, it vests the title in the proposed beneficiary. Real Prop. L., §§ 72, 73; *Adams* v. *Perry*, 43 N. Y. 487. The remainders being contingent, there may be a reversion in the heirs of the devisor; but it is impossible that there should be a fee in the trustees. The remarks of the court on this point were not necessary to the result, and on appeal the judgment was affirmed, but on the theory that the trustees had a mere power to convey and that all the parties entitled in remainder had been cited and were bound by the result. *Matter of Baer*, 147 N. Y. 348. Such cases are to be distinguished from those where an imperative power of sale effects a conversion into personalty, and deprives the remaindermen or reversioners of any title to the land itself,

except perhaps in some shadowy and purely theoretical sense. *Delafield* v. *Barlow*, 107 N. Y. 535.

A residuary clause directing distribution of "all the rest," may include the remainder in a trust fund created by previous provisions for the life of a beneficiary. *Delehanty* v. *St. Vincent's O. A.*, 56 Hun, 55, aff'd 134 N. Y. 612. Power to fix a discreet time for paying a legacy, does not prevent its vesting. *Hone's Ex'rs* v. *Van Schaick*, 20 Wend. 564 (568). Where real estate is directed to be sold under a power, and distributed as personalty, and the person entitled to the proceeds dies before the execution of the power, such proceeds are to be distributed as the personal estate of the decedent, in the same manner as if the property had been sold before his death. *Bunce* v. *Vander Grift*, 8 Pai. Ch. 37.

§ 615. **Descendant—Advancement.**—"An estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust with a right of selection, is an advancement." Real Prop. L., § 295; which see for further provisions as to advancements. *Kent* v. *Hopkins*, 86 Hun, 611.

§ 616. **Children—Descendants—Issue.**[1]—A power to be exercised for the benefit of "children" refers to offspring of the first degree unless it appears that there were no persons in existence who would answer that description at the time of making the will, or that there might be none at the time or in the event contemplated by the testator, or where the testator has clearly shown by the use of the word, or in other portions of the will, that he employed the word "children" as synonymous with "descendants" or "issue" or to designate another class of persons. *Mowatt* v. *Carow*, 7 Pai. Ch. 328; *Palmer* v. *Horn*, 84 N. Y. 516; *Matter of Potter*, 71 Hun, 77. A power to appoint among "*descendants*" of a person named, *prima facie* relates to those who are his descendants at his death. A living person cannot, in a technical sense, have descendants. But even in this sense it authorizes the appointment, during the life of the ancestor, of a contingent remainder to such persons as shall, at his

[1] See *post*, § 757.

death, be his descendants. *Hillen* v. *Iselin*, 144 N. Y. 365. For a discussion of the term "issue" see *Chwatal* v. *Schreiner*, 148 N. Y. 683; *Drake* v. *Drake*, 134 N. Y. 220.[1]

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[1] For a discussion of the term "relations" in reference to the persons among whom property is to be appointed under a power, and the question whether it refers to relations generally, or to those who would be entitled under the statutes of descent and distribution, and the distinction, in this respect, between powers that do, and those that do not, involve discretion in selecting the appointees from among the class of "relations," see *Gallagher* v. *Crooks*, 132 N. Y. 338; *Platt* v. *Mickle*, 137 N. Y. 106; *Pope* v. *Whitcombe*, 3 Mer. 689; *Walter* v. *Maunde*, 19 Ves., 426; *Supple* v. *Lowson*, Ambl. 730; Sugden on Powers, chap. 15; *Supreme Council* v. *Bennett*, 47 N. Y. Eq. 39; *Whithorne* v. *Harris*, 2 Ves. 527; *Handley* v. *Wrightson*, 60 Md. 206; *Devisne* v. *Mellish*, 5 Ves. 529, and cases there cited in notes; *Green* v. *Howard*, 1 Bro. C. C. 31, and notes; *Esty* v. *Clark*, 101 Mass. 38; *Kimball* v. *Story*, 108 Mass. 385; *Harding* v. *Glynn*, 1 Atk. 469, and note.

CHAPTER XX.

THE PURPOSE OF THE POWER.

§ 617. **What purposes authorized.**—The statute relating to Powers provides in particular for a general and beneficial power to a married woman to dispose of real property conveyed or devised to her in fee (Real Prop. L., § 122); and for a special and beneficial power (1) to dispose of any estate less than a fee, belonging to her, and (2) to a tenant for life to make certain leases. (Real Prop. L., § 123); as to these powers, see *ante*, Chapter XIX. The statute also refers to powers to transfer, to encumber (Real Prop. L., § 115); to dispose of, to charge (*Id.*, § 118); to revoke (*Id.*, § 125); to sell (*Id.*, § 126); to mortgage (*Id.*, § 136); to distribute (*Id.*, § 138); to select beneficiaries (*Id.*, § 140). But the specification of these particular powers is not inconsistent with the creation of powers for other purposes. For a power may be created for any purpose not in itself illegal (*Reynolds* v. *Denslow*, 80 Hun, 359; but compare *ante*, § 544) and except in so far as an express trust may be prescribed by statute as the sole method of effecting a given purpose (as to which, see § 552, p. 442). Such is also the general rule of the English law. Farwell on Powers (2nd ed.), 110. Thus, a valid power may be created *to sell* (which power does not in itself involve power to mortgage, *Albany F. I. Co.* v. *Bay*, 4 N. Y. 9, 19; *Cumming* v. *Williamson*, 1 Sandf. Ch. 17, 25; *Losey* v. *Stanley*, 147 N. Y. 560, 568. But as to whether power to sell or *otherwise convey*, authorizes a mortgage, see *Albany F. I. Co.* v. *Bay*, 4 N. Y. 9). A power to sell land devised, and pay over proceeds to the devisee, is not repugnant, if the intent is to give the *proceeds* to devisee instead of the land. *Skinner* v. *Quin*, 43 N. Y. 99, and the power to sell may itself be given for any lawful purpose, as to pay debts; to effect a convenient distribution, *Kinnier* v. *Rogers*, 42 N. Y. 531 (535); *Manice* v. *Manice*, 43

N. Y. 303 (364); for the advantage, in any way, of the estate, *Lindo* v. *Murray*, 91 Hun, 335; *to mortgage*, *Mut. Life Ins. Co. of N. Y.* v. *Shipman*, 108 N. Y. 19; *to partition* (which also includes power to sell for the purpose of effecting partition, if sale is appropriate for that purpose), *Knapp* v. *Knapp*, 46 Hun, 190; *Holly* v. *Hirsch*, 135 N. Y. 590 (595); *Manice* v. *Manice*, 43 N. Y. 303 (364); *to appoint*, *Matter of Stewart*, 131 N. Y. 274; (a power to appoint legatees renders inapplicable the rule that a legacy shall be paid in one year, *Dixon* v. *Storm*, 5 Redf. 419); to appoint a remainder, *Floyd* v. *Carow*, 88 N. Y. 560; *to distribute*, *Crittenden* v. *Fairchild*, 41 N. Y. 289 (293); *to change a devise* for life to a fee by giving a certificate, *Viele* v. *Keeler*, 129 N. Y. 190; *to appoint an executor* of a will, or a trustee, *Cuthbert* v. *Babcock*, 2 Dem. 96; *Hartnett* v. *Wandell*, 60 N. Y. 346; *Rogers* v. *Rogers*, 4 Redf. 521; *Belmont* v. *O'Brien*, 12 N. Y. 394 (405); *to appraise*, *Manice* v. *Manice*, 43 N. Y. 303 (364); *to collect dividends*, *Onondaga T. & D. Co.* v. *Price*, 87 N. Y. 542 (547); *to cut off a contingent devise* by conveying the fee, *Jackson* v. *Edwards*, 7 Pai. Ch. 386; *in executors*, *to sell*, and invest proceeds until their accounts are settled, *Williams* v. *Freeman*, 98 N. Y. 577; *to lease*, *Henderson* v. *Henderson*, 113 N. Y. 1; *Matter of Seebeck*, 140 N. Y. 241. This power to lease may or may not involve the right to receive the rents. Thus, a life estate in the use and income of one third of a house may be given to A, and power to lease the whole house and receive the rents of the other two thirds, to executors. *Starr* v. *Starr*, 132 N. Y. 154. *To have entire management* and control; under this head there has been some apparent disagreement among the authorities on the point whether a power to receive rents, which is a usual feature in trusts to manage, is not inconsistent with a mere power, on the theory that authority to receive rents involves title. Thus, it is held in *Wood* v. *Wood*, 5 Pai. Ch. 596 (603), that where lands are devised to one, power to receive and apply the rents to the use of the owner could not be given to another. On the other hand, however, the authorities are numerous that there may be a valid power to take entire charge, control and management of real and personal property; to lease; to collect and apply rents and income; to invest, to insure; to pay taxes and assessments;

to repair; to pull down buildings and erect new ones, etc., *Henderson* v. *Henderson*, 113 N. Y. 1; and from the rents to pay annuities and distribute the surplus, *Matter of Seebeck*, 140 N. Y. 241; to the same effect, see *Starr* v. *Starr*, 132 N. Y. 154; *Holly* v. *Hirsch*, 135 N. Y. 590 (595); *Blanchard* v. *Blanchard*, 4 Hun, 287 (289), aff'd 70 N. Y. 615; *Tucker* v. *Tucker*, 5 N. Y. 408; *Heermans* v. *Robertson*, 64 N. Y. 332 (341), see 78 N. Y. 259; *Van Brunt* v. *Van Brunt*, 111 N. Y. 178 (186 *et seq.*). There are cases where the duties imposed upon the grantee of a so-called power to receive rents are such that title in him is requisite to enable him to perform the duties imposed, in which case, if the purposes are such as may be carried out by a trust, an express trust will be implied, *Ward* v. *Ward*, 105 N. Y. 68 (73–74); and in still others, authority to one to collect rents and profits, for his own benefit, will carry also the beneficial title. *Jennings* v. *Conboy*, 73 N. Y. 230. Another authorized purpose of a power is a power reserved or granted to terminate a trust. It has been said that a power to terminate a trust is not a technical power, but a condition. *Matter of Vanderbilt*, 20 Hun, 520 (525). But evidently there might be a technical power the exercise of which would necessarily result in terminating a trust, and also that a technical power for that particular purpose is specified in the statute. Real Prop. L., § 128.

§ 618. **Powers and trusts combined.**—The existence of an express trust does not interfere with the contemporaneous existence of a power in trust, affecting the same property. Thus, there may be a trust of land to receive and apply rents and profits, together with a power in the trustee to lease, or mortgage, or sell. *Miller* v. *Wright*, 109 N. Y. 194. So there may be a trust to receive and apply rents of land, coupled with a power of sale, the proceeds still to be held in trust to receive and apply the income. *Fincke* v. *Fincke*, 53 N. Y. 528; *Belmont* v. *O'Brien*, 12 N. Y. 394. But a devise of land to trustees in trust to receive the rents and profits, but with no direction to apply them; and to sell, and hold the proceeds on a valid trust, may not create a valid trust as concerns the land, so as to pass the title to the trustees. Perhaps it creates only a power in trust, for the purpose of raising funds, and the trust as such covers only

the proceeds. *Holly* v. *Hirsch*, 135 N. Y. 590 (594). Such a trust might, however, it would seem, be a valid trust even as to the land, if so intended, if regarded as a trust to sell land in order to pay a legacy, *i.e.*, a legacy of the proceeds to a trustee to hold in trust. See *ante*, § 400, p. 291 ; p. 441.

An express trust to receive and apply, or receive and accumulate, rents, may be coupled with a power to apply the principal to the use of the beneficiary. This latter is not a trust, for no express trust is authorized for that purpose. But as a power it is valid, whether viewed as a power to sell and apply, or as a power to sell and hold the proceeds as personalty on a trust to apply them—the purpose for which a trust of personalty may be created being unrestricted. *Gilman* v. *Reddington*, 24 N. Y. 9 (14) ; *Kilburn* v. *See*, 1 Dem. 353 ; *Roosevelt* v. *Roosevelt*, 6 Hun, 31 (40), aff'd 64 N. Y. 651. Such a feature does not interfere with the vesting of the remainder limited on the trust, but merely renders it defeasible. *Van Axte* v. *Fisher*, 117 N. Y. 401. See Real Prop. L., § 31. Power in a trustee, to sell, and reinvest proceeds in other lands subject to the same trust, is not inconsistent with the inalienable nature of the trustee's estate in the lands, and his execution of the power does not run counter to the statutory prohibition of sales in contravention of the trust. *Roosevelt* v. *Roosevelt*, 6 Hun, 31 (43–44), aff'd 64 N. Y. 651. Power to grant or devise the entire estate, *and* a *trust* for the life of the donee, may be harmonized by making the power apply only to the *remainder*. *Crooke* v. *Co. of Kings*, 97 N. Y. 421 (432). There may also be two powers, one in one person, and one in another, affecting the same property and even the same transaction, *e.g.*, there may be a power in A to appoint the persons to whom a conveyance shall be made, and a power in B to convey accordingly. *Schenck* v. *Ellingwood*, 3 Edw. Ch. 175. And so there may be a power subject to the exercise of another power. *Livingston* v. *Murray*, 68 N. Y. 485 ; and a trust in land in one person, and a power to sell the land free of the trust in another person. *Pollock* v. *Hooley*, 22 N. Y. Supp. 215 ; 67 Hun, 370.

§ 619. Power and contingent trust.—Where a power of sale to be exercised in future is given to executors, with a provision

that if in the meantime the widow should fail to suitably educate the children, the executors should have possession and collect and apply the rents, etc., the existence of the *contingent* devise in trust does not make the power anything more than a mere power. *Reed* v. *Underhill*, 12 Barb. R. 113 (116–117).

§ 620. **Unlawful purpose.**—An attempt to create a power may fail, though the requisite formalities are observed, because the purpose is either repugnant to the other dispositions of the deed or will, or is *per se* illegal. Thus, where a will devises a life estate subject to a power in the same devisee to receive and apply the rents thereof to himself for life, the power fails. The life tenant has, as such, an inherent power as owner to receive and use the rents. *Beck* v. *McGillis*, 9 Barb. R. 35 (51). Or the purpose may be contrary to a statutory provision, as a power to receive and accumulate rents in order to pay a legacy to a trustee to be held in trust. *Garvey* v. *McDevitt*, 72 N. Y. 556. Or the purpose may be too indefinite to permit of enforcement by the court. *Henly* v. *Fitzgerald*, 65 Barb. R. 508. Or where an estate which a will attempts to create is void, for continuing a suspension for an illegal period, a power of sale, to take effect at the termination thereof, is also void. *Dana* v. *Murray*, 122 N. Y. 604 (618). Compare *Hone's Ex'rs* v. *Van Schaick*, 20 Wend. 564; *Moore* v. *Moore*, 47 Barb. R. 257. So a power given to accomplish any illegal or forbidden purpose is void. *Robert* v. *Corning*, 89 N. Y. 225 (236). A power to sell land and pay the proceeds to a corporation, is not a devise to the corporation, and is not invalid because of the inability of the corporation to take by devise. *Downing* v. *Marshall*, 23 N. Y. 366 (392). But a devise of land in trust to receive and pay the rents to a corporation unable to take by devise, is invalid, and cannot be sustained by turning it into a power to effect the same end. *Downing* v. *Marshall*, 23 N. Y. 366 (388), and 1 Abb. Ct. App. Dec. 525 (530). Compare with a devise in trust to receive and pay the rents to an alien, which is valid. *Ante*, § 358. See also, as to powers effecting suspension of the power of alienation, *post*, Chapter XXII.

§ 621. **Must be some purpose.**—Although any lawful purpose (compare § 544) will suffice to sustain a power, there must

be some purpose. A purely passive power is invalid. *Aldrich* v. *Funk*, 48 Hun, 367 (375). And so with a power the purpose of which, though apparently intended to be active, is so vague, indefinite and uncertain, that the court cannot ascertain with reasonable certainty what the power really is, in order to enforce it. *Clapp* v. *Byrnes*, 3 App. Div. 284. But if the purpose be active, the fact that it is not set forth in express terms is not fatal, if it may be clearly implied from the entire instrument. Thus where a will contains a disposition of property and leaves the same to trustees with power to sell, without in terms saying what shall be done with proceeds, it will be presumed that they are to be applied to the purposes of will. *Royce* v. *Adams*, 123 N. Y. 402 (404). In this case the original trustees were also in fact the executors of the will.

CHAPTER XXI.

THE EXECUTION OF POWERS.

(1) *Method, Scope and Time of Execution.*

§ 622. **Form of execution.**—" A power can be executed only by a written instrument, which would be sufficient to pass the estate, or interest, intended to pass under the power, if the person executing the power were the actual owner." Real Prop. L., § 145. See *post*, § 626. The instruments to be considered are, therefore, wills, conveyances (Real Prop. L., § 207), and contracts (*post*, § 625).[1]

§ 623. **Execution by will.**—" Where a power to dispose of real property is confined to a disposition by devise or will, the instrument must be a written will, executed as required by law." Real Prop. L., § 147. It may sometimes be difficult to determine whether the power is " confined to a disposition by devise or will." It is a question of intent ; but the mere reference to donee's death will not *per se* make the power testamentary only, *e.g.*, a power to B, the life tenant, to dispose of the remainder after his own death. Here the reference to B's death may merely relate to the future estate which will then begin, and which B is empowered to dispose of. Farwell on Powers (2d ed.), 60. See Real Prop. L., § 148. A power to appoint " by will or otherwise," or " by deed or otherwise," is of course not confined to the instrument particularly specified. So an " instrument in

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[1] Article VIII. of the Real Property Law) Recording Instruments Affecting Real Property), applies to instruments in execution of a power, even though the power be one of revocation only, such instruments being covered by the term " conveyance" there employed, except wills, leases for a term not exceeding three years, and executory contracts for sale or purchase. Real Prop. L., § 240.

writing" would include both deeds and wills. Farwell on Powers (2d ed.), 173. The term "executed as required by law," is to be interpreted with reference to the statutory requirements relating to due execution. Code C. P., §§ 2694, 2611, 2476 *et seq.* But the right to have a will admitted to probate, the validity of the execution thereof, and the validity and construction of any provision contained therein, is not affected by a change of the testator's residence made since the execution of the will. Code C. P., § 2611. These principles apply to the case of a will containing an exercise of a power. *Betts* v. *Betts*, 4 Abb. N. C. 317 (389). And where a power, while not *confined* to a testamentary exercise, permits it, and the donee elects to execute it by will and not by deed, still the instrument "must be a written will executed as required by law." See *ante*, § 622.

In case the power is a general and beneficial power to devise the inheritance, and the donee is a tenant for life or years, he thereby acquires a fee, and becomes entitled, under the statute, to convey by grant. *Ante*, § 567. Such a conveyance is made, however, not in execution of a technical power, but under the inherent power of the owner of the fee, who has become such by virtue of the operation of the statute in merging, so to speak, his estate and power.

A's will gave his real and personal property to B absolutely. It also provided that B should also, during A's life, have "power" to devise and bequeath said property by will "heretofore or hereafter made," to take effect in case B died first, in which case said property was to be turned over at A's death to the executor or trustee named in B's will. It seems that this was not a "power of appointment," because of the absolute ownership and control continued in A during his life, but *held* that the devisees and legatees under B's will made and going into effect during A's life, took the property by virtue of A's will, B's will acting only to ascertain the persons entitled, and the proportions, under A's will. *Matter of Piffard*, 111 N. Y. 410. But see *ante*, § 77.

§ 624. Execution by grant.—"Where a power is confined to a disposition by grant, it cannot be executed by will, although the disposition is not intended to take effect until after the death

of the person executing the power." Real Prop. L., § 148. *Coleman* v. *Beach*, 97 N. Y. 545 (556); *Smith* v. *Chase*, 90 Hun, 99; compare *Hellenberg* v. *Dist. No. One, &c.*, 94 N. Y. 580. See *ante*, §§ 565, 566.[1]

Under a power in the executor to mortgage, the fact that the bond secured by such a mortgage to raise funds for the estate is signed by the executor individually, and not as executor, is immaterial. *Roarty* v. *McDermott*, 146 N. Y. 296 (301). So with a deed executed by virtue of a power vested in the executor. *Wright* v. *Syracuse, Ontario & N. Y. R. R. Co.*, 92 Hun, 32 (35); Real Prop. L., § 155. If under a power to sell, a deed in execution thereof is tendered by the donee to a purchaser, and is rejected for an alleged defect in the title, which, however, is subsequently established as valid, by decree, the prior tender does not act as a conditional delivery; there must be a new delivery. *Mott* v. *Ackerman*, 92 N. Y. 539 (552). Where the grantor in a trust deed, who is also beneficiary under the trust, reserves a power to appoint and direct a conveyance by her deed, the conveyance to be made by the trustee according to such appointment; and pending the trust the beneficiary executes and delivers a mortgage, this constitutes a valid appointment and conveyance, the assent or conveyance of the trustee not being requisite. *Campbell* v. *Low*, 9 Barb. R. 585 (589). The Real Property Law, in § 221, establishes the construction to be given, in any deed by an executor of, or trustee under, a will, of the words "together with the appurtenances and also all the estate which the testator had at the time of his decease in said premises, and also the estate therein which said grantor has or has power to convey or dispose of, whether individually or by virtue of said will or otherwise."[2]

§ 625. **Agreement to execute.**—The donee of a power to sell, may enter into an executory contract for such sale, and the per-

[1] "If a married woman execute a power by grant, the concurrence of her husband as a party shall not be requisite, but the grant shall not be a valid execution of the power unless it be acknowledged by her on a private examination in the manner prescribed, etc. 1 R. S. 736, § 117. Repealed, and not re-enacted, by the Real Property Law.

[2] For the statutory form of executor's deed, see Real Prop. L., § 223.

formance of the contract may be decreed in equity at the suit of the purchaser. The contract of sale is, in effect, an execution of the power, and confers upon the purchaser an equitable title to the land sold, and the court will compel the donee to perfect that title by a conveyance, where the contract is fair and for a sufficient consideration, and there is no default or laches on the part of the purchaser, *Bostwick* v. *Beach*, 103 N. Y. 414 (421), and a deed subsequently given in pursuance of the contract, relates back to the execution of the contract, as if then delivered, as against subsequent purchasers with notice. *Demarest* v. *Ray*, 29 Barb. R. 563.[1] Specific performance may be enforced though the land lies in another State, *Newton* v. *Bronson*, 13 N. Y. 587, in which case the same result follows even though the trustee holds only as mortgagee, if by the law of the State where the land lies a mortgagee has title to the land, and may in the given case convey. See *Harrison* v. *U. T. Co.*, 144 N. Y. 326 (332–333). The fact that the trustee holding the power is an infant does not prevent a decree directing a conveyance. *Ante*, § 108 ; *Anderson* v. *Mather*, 44 N. Y. 249 (259). If the other party refuses to accept a deed, the donee may bring suit for specific performance, and in case of his death the suit may be continued by his successor. *Farmers' L. & T. Co.* v. *Eno*, 21 Abb. N. C. 219 ; *McCready* v. *Metropolitan Life Ins. Co.*, 83 Hun, 526, aff'd 148 N. Y. 761. These cases are to be distinguished from those holding that an executor cannot make a valid contract to convey land over which he has no power, "as soon as he can obtain a sale of the same under an order of the surrogate." *Herrick* v. *Grow*, 5 Wend. 579 ; or where, under a special statute or for any other reason, a sale must be effected at public auction. *Egerton's Adm'rs* v. *Conklin*, 25 Wend. 224. Where trustees or donees make a contract of sale, and the purchaser refuses to complete, they must account to the beneficiaries of the trust or power for the amount paid down by the purchaser and forfeited. *Campbell* v. *Johnston*, 1 Sandf. Ch. 148.

§ 626. Disregarding grantor's directions.—"Where the grantor of a power has directed or authorized it to be executed

[1] As to recording executory contracts for sale or purchase, see Real Prop. L., § 244 ; *Trustees of Union College* v. *Wheeler*, 61 N. Y. 88 ; *Boyd* v. *Schlesinger*, 59 N. Y. 301.

by an instrument not sufficient in law to pass the estate [see *ante*, § 622], the power is not void, but its execution is to be governed by the provisions of this article." Real Prop. L., § 149.

"Where the grantor of a power has directed any formality to be observed in its execution, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formality is not necessary to the valid execution of the power," Real Prop. L., § 150; *e.g.*, a requirement that the instrument in execution of a power to appoint by deed should be attested by two witnesses. *Schenck* v. *Ellingwood*, 3 Edw. Ch. 175; or a requirement that the instrument in execution shall contain certain recitals. *Bradstreet* v. *Clarke*, 12 Wend. 602.

"Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power." Real Prop. L., § 151. *Kissam* v. *Dierkes*, 49 N. Y. 602.

§ 627. Intent of grantor to be observed.—"Except as provided in this article [Article IV., Powers], the intentions of the grantor of a power as to the manner, time and conditions of its execution must be observed; subject to the power of the Supreme Court, to supply a defective execution as provided [*post*, § 666] in this article." Real Prop. L., § 152.

(*a*) Every power is to be exercised in the *manner* prescribed. Thus, a power to sell, does not authorize an exchange, *Woerz* v. *Rademacher*, 120 N. Y. 62 (69). But a power to sell, and buy other land with the proceeds, authorizes an exchange, *Mayer* v. *McCune*, 59 How. Pr. 78. So a power to sell does not authorize a mortgage, *Arnoux* v. *Phyfe*, 6 App. Div. 605; *Bloomer* v. *Waldron*, 3 Hill, 361; *Coutant* v. *Servoss*, 3 Barb. R. 128 (140); *Cumming* v. *Williamson*, 1 Sandf. Ch. 17; *Albany F. I. Co.* v. *Bay*, 4 N. Y. 9; *contra* in England, where "a power of sale generally authorizes a mortgage." Farwell on Powers (2d ed.), 558. And a power confined to sales, cannot be evaded by a nominal conveyance to a dummy, and the execution of a mortgage by him to a party with notice. *Arnoux* v. *Phyfe*, 6 App. Div. 605; *Benedict* v. *Arnoux*, 7 App. Div. 1. But a power to sell or dispose of all or *any part* of the estate authorizes a mort-

gage. *Hawley* v. *James*, 16 Wend. 60 (153); *Leggett* v. *Perkins*, 2 N. Y. 297 (318). And a power to purchase authorizes the giving of a purchase money mortgage. *Coutant* v. *Servoss*, 3 Barb. R. 128 (140). Power to sell, contained in a mortgage, is regulated by statute, the provisions of which must be followed. *Lawrence* v. *Farmers' L. & T. Co.*, 13 N. Y. 200; *Id.*, p. 642. Power to borrow money and therewith repair and improve real property, implies a power to mortgage. *Wetmore* v. *Holsman*, 14 Abb. Pr. 311. A power to sell does not authorize a lease. *Crooked Lake Nav. Co.* v. *Keuka Nav. Co.*, 4 N. Y. State Rep. 380. But a power to sell *and dispose* of land has been held to warrant a lease. *Hedges* v. *Riker*, 5 Johns. Ch. 163. And in any event a power to sell or dispose of all *or any part* of testator's estate, authorizes a lease. *Leggett* v. *Perkins*, 2 N. Y. 297 (318). A lease is an alienation of part of the estate; so is a mortgage. *Hawley* v. *James*, 16 Wend. 60 (153). It seems that an imperative power to an executor to sell land to pay legacies, "in such portions, or parcels, or altogether," as the donee may think best or most profitable, includes a power to cut down and sell off timber growing on the land, and thereby convert the timber into personalty. *Keller* v. *Ogsbury*, 121 N. Y. 362 (366). A power in trust to divide, does not authorize a sale, *Craig* v. *Craig*, 3 Barb. Ch. 76. A power to sell and to reinvest, was held in *Manier* v. *Phelps*, 15 Abb. N. C. 123 (137) not to be restricted to sales for the purpose of reinvestment only, but to cover sales for distribution, or to pay debts, the decision going on the theory that there were two powers, *i.e.*, a power to sell, and also a power to reinvest.

Where a will gave property to A, and a codicil revoked this, and gave it to several, with power in B to appoint to A one half of what was then taken away, the codicil was held to refer to one half of each share thus given to others, and not one half of the total apportioned as the donee might decide. *Kane* v. *Astor's Ex'rs*, 9 N. Y. 113 (133).

(*b*) A power must be exercised for the *purpose* intended. *Allen* v. *De Witt*, 3 N. Y. 276; *Hetzel* v. *Barber*, 69 N. Y. 1 (13); *Jackson* v. *Jansen*, 6 Johns. R. 73; *Sharpsteen* v. *Tillou*, 3 Cow. 651. Thus: a devise of certain land to testator's wife for life, remainder to his children, the life estate being charged

with the support of the children ; to the executors, a discretionary power to sell the said land, and invest the proceeds and apply the income and principal to use of same devisees. There was other land. There was not enough personalty to pay debts. It was held, that the said power of sale did not warrant a sale thereunder to pay the debts. *Matter of McComb*, 117 N. Y. 378. As to how far this is affected by infancy of children, see *Id.*, p. 383. A discretionary power in the executors and trustees to sell land, at such time and manner as shall to them seem best for the interests of the estate, and invest the proceeds and dispose of them according to the terms of the will, does not warrant a conveyance or release of the land to a creditor whose claim should be paid from personalty, if sufficient, or from realty only through statutory proceedings for leave to sell to pay debts. The sale contemplated by the will is one to realize proceeds for investment, at a time when the land can be sold to better advantage than if held. *Scholle* v. *Scholle*, 113 N. Y. 261 (273 *et seq.*) ; *Arnoux* v. *Phyfe*, 6 App. Div. 605 ; *Allen* v. *De Witt*, 3 N. Y. 276 ; *Russell* v. *Russell*. 36 N. Y. 581. In *Scholle* v. *Scholle*, 113 N. Y. 261, the court say : " The power of sale given by the will was to sell at times or in a manner which the executors should deem for the best interest of the estate. The authority contemplated first a sale, and second the exercise of a judgment as to the best interest of the estate. Here there was, in truth, no sale such as the will contemplated. That was one for the purpose of realizing proceeds to be invested as the source of income and interest, and at a time when such values could be realized as would justify a sale instead of further delay for an appreciation of value. Nothing of that kind took place. No proceeds were realized. The land was appropriated to pay a debt chargeable primarily upon the personal property without an order of the surrogate or proof that the personal assets were insufficient to pay the debts. The authority to sell was given for one distinct and definite purpose, and not at all to enable a disputed debt to be compromised. The deed, therefore, passed no interest of the remainderman, and the surrogate was powerless to take it away and appropriate it to the payment of debts except in the statutory method." And in *Harris* v. *Strodl* (132 N. Y. 396) it is said that : " The power is to sell and convey whenever they may

deem it best to do so, and upon such terms as they deem desirable. It is contended that they deemed it best to convey to the defendant for the purpose of vesting in him the remnant of the title which remained unconveyed after the conveyance of the widow and children, and that they deemed the confirmation of that conveyance upon the consideration expressed in it desirable terms. This may meet the letter of the power, but does not satisfy the spirit. . . . Clearly they ought to have so sold these as to secure the proceeds to the grandchildren in the event of the contingency happening, making them the ultimate devisees of the testator. But as the case is presented the executors made the conveyance to the defendant so as to enable the takers of the defeasible estates to keep and convert to their own use the full price of the whole estate, as if their children had no contingent future estate in it. The plaintiff has full knowledge of all these facts."

If an executor with a power of sale to pay debts should undertake to sell for an invalid or outlawed debt, the court, on the application of the heir or devisee, will interpose for his protection. *O'Flynn* v. *Powers*, 136 N. Y. 412 (423), citing *Butler* v. *Johnson*, 111 N. Y. 204. A power of sale in the executor, to pay debts, may be exercised by him for the purpose of paying a debt due to himself from the decedent, allowed in his accounting by the surrogate. *O'Flynn* v. *Powers*, 136 N. Y. 412 Power to mortgage or sell for the benefit of an infant in whom land is vested subject to the execution of the power, does not authorize a mortgage to secure debts of a third party. and such mortgage is void. *Syracuse Sav. Bk.* v. *Holden*, 105 N. Y. 415 (419). The grantee of the power has an authority, and must follow it merely. *Hillen* v. *Iselin*, 144 N. Y. 365 (373). Unauthorized execution of a power conveys no title except as to such part, if any, as is *vested beneficially* in the donee. *Smith* v. *Bowen*, 35 N. Y. 83 (89). Where land is vested subject to a general power in trust to mortgage in the discretion of the donee, to raise funds for such payments from the corpus to testator's children as the donee should deem best, for education and maintenance, and on foreclosure of a mortgage given by the donee it does not appear that it was given for any other purpose, nor, if it was, that the mortgagee was chargeable with any knowledge

thereof, it is valid and enforceable. *Mut. Life Ins. Co. of N. Y.* v. *Shipman*, 108 N. Y. 19. Though the power must be exercised for the purpose for which it is given, yet if it is general, and unlimited, and no purpose is named except the advantage of the estate, as determined by the donee, it may be exercised for any purpose within its general scope. *Lindo* v. *Murray*, 91 Hun, 335. The same instrument may confer two powers on the same person, one general and unrestricted, and the other special and limited. In such a case, a deed executed by the donee may be good under the general power, although the special one either does not apply or is invalid. *McCready* v. *Metropolitan Life Ins. Co.*, 83 Hun, 526, aff'd 148 N. Y. 761. So there may be two powers, one express and limited, and one implied but general. In such a case, a deed may be valid under the implied power, though it does not fall within the terms of that expressed. *Messenger* v. *Casey*, 18 Week. Dig. 71.

(*c*) A power in trust must be exercised for the benefit of the *persons indicated* in the instrument creating it, and not for non-objects. *Shannon* v. *Pickell*, 2 N. Y. State Rep. 160; *Syracuse Sav. Bk.* v. *Holden*, 105 N. Y. 415. See *post*, § 660. A power given by will to sell, may be annulled by the testator's act in selling and conveying the same land. But if, in such a case, the testator makes a binding contract to convey, but dies before conveyance, so that the legal title passes to his heirs, or devisees, while the so-called equitable title is in the vendee, the question has been raised whether the general power to sell all testator's land enables the donee to convey the legal title to the vendee. In *Roome* v. *Philips*, 27 N. Y. 357, it was held that the heirs must join in the conveyance. In that case, the power was given to executors, but was attempted to be exercised by an administratrix with the will annexed, the first question presented thus being whether the power had passed at all to her. The court held in the negative on that question, but required the administratrix to join in the deed because she asserted a right to execute it. See also *Lewis* v. *Smith*, 9 N. Y. 502. The authority of the *Roome* case appears to be shaken, even within its own limits, but at any rate is strictly confined to cases where the facts presented and passed on are the same, and does not apply to a power coupled with an interest (*ante*, § 539). *Holly* v. *Hirsch*, 135

N. Y. 590. It applies, at most, only where the power of sale is a mere naked power, and the donee of the power has no interest in its execution. But where testator creates a valid power to sell all his land, and gives to the donee all or a portion of the proceeds outright, or all or a portion thereof to hold on a valid trust, the power is coupled with an interest and entitles the donee to give clear title to the proposed grantee under a contract of sale made by the testator before his death, but of which the legal title still remained in testator at his death. Though there is nothing but the mere legal title to descend to testator's heirs, it descends subject to the exercise of the power, just as if the entire legal and equitable title had descended. *Holly* v. *Hirsch*, 135 N. Y. 590. See also the general discussion in *Williams* v. *Haddock*, 145 N. Y. 144.

(*d*) *Conditions* imposed by the trust instrument, must be complied with, whether they are to precede or accompany the exercise of the power. *Harris* v. *Strodl*, 132 N. Y. 392 (397 and cases cited); *Kissam* v. *Dierkes*, 49 N. Y. 602; *Barber* v. *Cary*, 11 N. Y. 397 (402); *Griswold* v. *Perry*, 7 Lans. 98 (104); *e.g.*, a power to sell if income is insufficient, *Griswold* v. *Perry*, 7 Lans. 98 (103). Distinct powers, for separate purposes, to be exercised only in a given order, cannot be exercised in the reverse order. Thus, power to sell to pay debts, if required, and after debts paid to sell and distribute proceeds, does not warrant any sale for distribution while any debts are outstanding. *Drake* v. *Paige*, 127 N. Y. 562 (572). As to whether a power to sell to pay debts or legacies if the personalty is insufficient, authorizes a sale under the power, for that purpose, where the insufficiency of personalty results from the waste and squandering thereof by the executor, see *Anderson* v. *Davison*, 42 Hun, 431, and for cases to the same point, but arising not under a power but in statutory proceedings for leave to sell, compare *Kingsland* v. *Murray*, 133 N. Y. 170, with *Matter of Bingham*, 127 N. Y. 296 (308) and cases cited. A power in an executor to sell land for any purpose which in the donee's judgment renders a sale desirable, authorizes a sale to pay debts. Such a general power is subject to the qualification that some permissible occasion exists for the exercise of his discretion in the respect he has in view. Thus he could not sell land to pay

claims of his own against the estate until they are proved and allowed. But if he does sell, before his claims are allowed, for other permissible purposes, and has a surplus of proceeds, he may use these to pay his claim when allowed, in the absence of personal property applicable thereto. *Matter of Powers*, 124 N. Y. 361.

A general power in a trustee to sell land at such times and in such manner as shall seem to him best for the interest of the estate, must not be exercised arbitrarily without any reference to interests of estate. See *M. L. Ins. Co.* v. *Woods*, 121 N. Y. 302, holding the sale there justified. As to power to sell on condition subsequent, see *Griswold* v. *Perry*, 7 Lans. 98 (104, 105). The execution of a power must conform to the spirit as well as the letter of the trust instrument. Thus, where a life estate is granted to A, with remainder to B defeasible by his death during the life estate, in favor of C, and the executors are given full power to sell and convey at any time on such terms as they may think desirable, deeds by A and B, who are to receive the total consideration for the fee, and by the executors, who are in fact to receive nothing as representing the possible interest of C, do not give, to a grantee who knows the facts, a clear title to the fee. The conveyance by A and B conveys only what they have —a life estate and a defeasible fee ; and the conveyance by the executors, while according to the letter of the power, does not satisfy its spirit. Their duty is to so sell the contingent remainder of C as to secure the proceeds for C in the event of his becoming entitled thereto. A marketable title is not offered, and the proposed vendee is entitled to recover back his deposit, etc. *Harris* v. *Strodl*, 132 N. Y. 392. Where a will creates a life estate in A, and on the death of A a share of the remainder is to be held in trust for B, for his life, and on B's death to go absolutely to his issue, or if no such issue then as A, the life tenant, shall by will direct ; otherwise to fall into the general estate ; these provisions, in themselves considered, contemplate that B is to outlive the life tenant, and that A's power to appoint shall only apply to a remainder to follow the trust estate for B. If the life tenant outlives B, there is no trust, and therefore no remainder after a trust, and so nothing for the power to act on. Such a conclusion, of course, depends on the intent expressed.

Austin v. *Oakes*, 117 N. Y. 577 (591). If the instrument granting the power requires the donee to give notice of the sale, or to sell at public auction, etc., it has been held, in case of powers created prior to the Revised Statutes, that when a sale is in fact effected, it will be presumed that the required preliminary steps were duly taken, *Bissing* v. *Smith*, 85 Hun, 564; *Minuse* v. *Cox*, 5 Johns. Ch. 441; at least so far as to protect the purchaser for value. And if they were not taken, the result would be that the purchaser would acquire a good title, while the donee of the power would be held liable for any loss resulting from the failure to comply with the terms of the power. *Minuse* v. *Cox*, 5 Johns. Ch. 441.[1]

If a power to appoint a remainder be given to A, "if the appointment be not contrary to the provisions which I shall leave in a certain paper," etc., or if contrary then the power is not to take effect, the result of the invalidity of the limitation on the power is not to make the power general, but to extinguish it. *Martin* v. *Pine*, 79 Hun, 426 (430).

(*e*) The *time* when, or the period within which, a power is to be executed, depends on the expressed intent of its donor, *Egerton's Adm'rs* v. *Conklin*, 25 Wend. 224, and must be determined by an inspection of the entire instrument creating it, and a consideration of the purposes for which it was conferred. *Richardson* v. *Sharpe*, 29 Barb. R. 222; *Hutchings* v. *Baldwin*, 7 Bosw. 236; *Martin* v. *Pine*, 79 N. Y. 426. If the power is given to be exercised at a future period, or upon the happening of a given

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[1] "Sales of real estate situate in the city and county of New York, or at any other place within the State of New York, made by executors in pursuance of an authority given by any last will, unless otherwise directed in such will, may be public or private, and on such terms as in the opinion of the executor shall be most advantageous to those interested therein." L 1883, ch. 65, § 1; Birdseye (2d ed.), p. 1233; other sections of which relate to the standing of such sales from September 1st, 1880, to the date of the Act. While this provision names executors only, its permission of either private or public sales represents a general rule affecting persons authorized either as trustees, or as donees of a power, to sell land. "In the absence of any directions upon the subject, the sale may be either public or private, as circumstances render it for the advantage of the estate, unless there are statutes [*e.g.*, in case of foreclosure by advertisement, Code C. P., 2388] that require all sales under powers to be at public auction." 2 Perry on Trusts, 602; 780–782.

contingency, it cannot be exercised earlier. *Drake* v. *Paige*, 127 N. Y. 562 (572); *Hall* v. *McLaughlin*, 2 Bradf. 107; *Allen* v. *De Witt*, 3 N. Y. 276; see *James* v. *Beasley*, 14 Hun, 520. And the result is the same where the postponement is implied instead of expressed. *Matter of Vandervoort*, 1 Redf. 270. And if it is to be exercised during a given period it cannot be exercised later. *Richardson* v. *Sharpe*, 29 Barb. R. 222. A power given to a life tenant, to be exercised during his life, cannot be continued in his executors by his will. *Coleman* v. *Beach*, 97 N. Y. 545 (557). And a power to appoint during the donee's life, though in trust, if in fact made absolutely dependent on the will of the donee, cannot be carried out by the court after his death leaving the power unexercised. See *Webb* v. *Sanford*, 55 Super. Ct. 139, aff'd 112 N. Y. 680. But though in terms given to be executed during or at a specified period, it may be executed later if such an intent is shown by the entire scheme of the will creating the power. *Waldron* v. *Schlang*, 47 Hun, 252; *Mott* v. *Ackerman*, 92 N. Y. 539 (550–551); *Coleman* v. *Beach*, 97 N. Y. 545 (557); *Phillips* v. *Davies*, 92 N. Y. 199; *Dorland* v. *Dorland*, 2 Barb. R. 63 (79); *Millspaugh* v. *Van Zandt*, 55 Hun, 463; *Allport* v. *Jerrett*, 61 Hun, 447; *Hellenberg* v. *District No. One, &c.*, 94 N. Y. 580; *Wild* v. *Bergen*, 16 Hun, 127 (129); *Gersen* v. *Rinteln*, 2 Dem. 243. See *post*, Chapter XXIV.

If, though the power be imperative, the time of its exercise is left discretionary, the donee's judgment on the question of time is conclusive. But that judgment he must exercise, and in good faith, or the court may put him in motion or act in his place. *Haight* v. *Brisbin*, 96 N. Y. 132; *Hancox* v. *Meeker*, 95 N. Y. 528 (535–537). If no time of execution is specified, and no special discretion is given to the donee, a reasonable time adjusted according to the facts of the case in hand, will be allowed. *Matter of Weston*, 91 N. Y. 502 (508). It has been held, in one case, that a sale should be effected within two years, in any event, unless some special reason exists for further delay. *Matter of Travis*, 85 Hun, 420. For a case of sale compelled after 20 years, see *Wilcox* v. *Quinby*, 20 N. Y. Supp. 5; 65 Hun, 621. But where the time for execution is to be determined solely by the judgment of the donee as to whether a specified

situation exists, the courts cannot coerce his judgment. *McLean* v. *McLean*, 3 Hun, 395, aff'd 62 N. Y. 627, where a conveyance was directed to A whenever the donee should be satisfied that A would make a proper use of it. A different question would arise if the contingency, instead of thus depending solely on a matter of opinion, consisted in the donee's being satisfied that some specific fact existed, the existence of which could be definitely ascertained and verified. For here his failure to be satisfied of it would be due to bad faith. See *ante*, §§ 474, 478, 480.

If a power is created, to be exercised at or after a certain event happens, or on a given contingency, its exercise will be valid though the instrument in execution is drawn up, dated, and signed before that time, but is not delivered or otherwise put into effect until the proper time comes. Farwell on Powers (2d ed.), 144, citing *Wandesforde* v. *Carrick*, 5 Ir. R. Eq. 486; *C. of Sutherland* v. *Northmore*, 1 Dick. 56; *Anon.*, 2 Leon. 220. This must be the case, in one sense, if the power is testamentary. See Real Prop. L., § 231. And see *Taggart* v. *Murray*, 53 N. Y. 233, where a power was given to the life tenant to dispose of the property by will *if* she left no heirs, and where, accordingly, even if the condition existed, the will must be executed before (in legal contemplation) it could be known that she would die without heirs. An analogy is found in the case of a deed from a married woman to her husband, executed before, and delivered after, the passage of a law authorizing such a conveyance, as in *Reynolds* v. *City Nat. Bank*, 71 Hun, 386. The principle is, of course, subject to a contrary intent, express or implied, in the instrument creating the power. A distinction is drawn by the English law between the cases illustrating the principle just stated, and a power which, in itself, is not to arise until a future or contingent event happens, or until a condition is fulfilled, and which cannot therefore be exercised until the event happens or the condition is fulfilled; for until then it is not an existing power to be exercised in future, but has in itself no existence as a power. Farwell on Powers (2d ed.), 147.

§ 628. **Power to appoint,** if general and beneficial, does not require the appointment of the legal title directly to the benefi-

cial appointees. It may be duly exercised, in the absence of any restrictive provision in the instrument creating it, by appointing to trustees on valid trusts. *Maitland* v. *Baldwin*, 70 Hun, 267; *Crooke* v. *County of Kings*, 97 N. Y. 421; *Cutting* v. *Cutting*, 86 N. Y. 522; *Frear* v. *Pugsley*, 9 Misc. 316; see *Gomez* v. *Gomez*, 147 N. Y. 195. So a beneficial power to "dispose," authorizes a disposition to a trustee in trust, and with a power of apportioning the income and of selling the land and reinvesting, even though the original power is one that cannot be delegated. For the original donee fully executes the power personally by disposing of the property in trust, and determining to whom it shall all go, even though the subsequent trustee have the powers above mentioned. In exercising these powers he is not executing in any sense the original power to dispose, which has already been fully executed by the original donee thereof. *Crooke* v. *County of Kings*, 97 N. Y. 421 (441, 452). But if it is a power in trust to appoint to or among designated persons or members of a designated class the rule is otherwise, and the appointment must be beneficial and not in trust. *Stewart* v. *Keating*, 15 Misc. 44 (55 *et seq.*). Farwell on Powers (2d ed.), 325. Compare *Busk* v. *Aldam*, L. R. 19 Eq. 16, given in Ames's "Cases on Trusts" (2d ed.), 460, where the power was to appoint among the donee's children "in such manner" as she should direct, and where an appointment to trustees for them was sustained. A power to appoint during life, does not require a single exercise only, but may, unless contrary to an intent expressed or implied, be executed piecemeal. Farwell on Powers (2d ed.), 164.

"An estate created by the execution of a power, takes effect in the same manner as if it had been created by the deed which raised the power. The party who takes under the execution of a power takes under the authority and under the grantor of the power, whether it applies to real or personal property, in like manner as if the power and the instrument creating the power had been incorporated in one instrument." 4 Kent, Comm., 338. Where the donee of the power has the right of selection, the interest appointed vests in the appointee at the time of the appointment, but his title relates to and is acquired under the instrument creating the power. *Matter of Stewart*, 131 N. Y. 274 (281). This principle is applicable when the question of the

derivation of the appointee's estate arises under the taxable transfer act. *Id.* Compare *Matter of Curtis*, 142 N. Y. 219 (223).

§ 629. **Cloud on title.**—An instrument in attempted execution of a power may constitute a cloud on the title, as where the power is conditional upon the happening of a condition precedent, *e.g.*, if the devisee for life of an estate in real property, be given the power to encroach on corpus, in so far as necessary for her comfort and support, this confers a qualified beneficial power. It authorizes either a sale or a mortgage, if the condition precedent exists. *Swarthout* v. *Ranier*, 143 N. Y. 499. The presumption is that a deed or mortgage in fact given, was given for the permitted purpose. *Id.* Therefore such an instrument is not void on its face. In a suit to foreclose the mortgage, the burden would be on the remaindermen to discredit it. *Id.* In enforcing his mortgage, the mortgagee would not necessarily disclose any defect. Therefore, the conditions exist which constitute such an instrument, if it was not in fact executed for the authorized purpose, a cloud on the title, and a suit will lie to remove the cloud. *Id.* But the existence, as distinguished from the attempted execution, of a power cannot create a cloud on the title. If it is valid, there is no cloud. If it is invalid, and its invalidity appears on the face of the instrument which attempts to create it, there is no cloud in a legal sense. *Mellen* v. *Mellen*, 139 N. Y. 210 (219), citing *Bailey* v. *Briggs*, 56 N. Y. 407; *Townsend* v. *Mayor*, 77 N. Y. 542, and cases there cited. *Hotchkiss* v. *Elting*, 36 Barb. R. 38. Compare Real Prop. L., § 276.

§ 630. **Invalidity adjudged after execution.**—As to the principles governing a case where, under a decree establishing the validity of a power, it has been executed, and thereafter the decree is vacated, or it is otherwise judicially determined that the power was invalid, see *ante*, § 297, and compare *Fischer* v. *Langbein*, 103 N. Y. 84.

Where a power is itself invalid, as through lack of beneficiaries to enforce its execution, or otherwise, the fact that it has been executed in a manner which, had it been specifically required in the instrument creating the power, would have ren-

dered the entire scheme valid, does not cure the defect. The validity of the power depends on its nature and not on its execution. *Tilden* v. *Green*, 130 N. Y. 29 (52); *Read* v. *Williams*, 125 N. Y. 560 (569); *Cutting* v. *Cutting*, 86 N. Y. 522. But the fact that a grantee of a power might, without departing from the general terms of the power, attempt to create an illegal estate, does not invalidate a power which does not contemplate or require any such illegal execution. *Hillen* v. *Iselin*, 144 N. Y. 365 (380); (and *post*, § 654 *et seq.*); *Power* v. *Cassidy*, 79 N. Y. 602 (612).

§ 631. **As against after-born child.**—Where an after-born child is entitled to take all the real estate as if there had been no will, a conveyance under a testamentary power passes no title as against him. *Smith* v. *Robertson*, 89 N. Y. 555. *Ante*, § 520 *e*.

§ 632. **Estoppel.**—One who might object to the validity of a power affecting land vested in him, may ratify acts done by virtue of it, as by accepting the proceeds of a sale thereunder, with knowledge of the facts; *Matter of Place*, 1 Redf. 276; or by coming into court and demanding such proceeds, *Matter of Clark*, 62 Hun, 275 (283–284). If the donee of a power might object to its application to a given case, or at a given time, as in hostility to rights given to him individually under the will, yet if he chooses to waive such objection, it is said that a vendee cannot raise it. *Knapp* v. *Knapp*, 46 Hun, 190.

(2) *Two or more Donees.*

§ 633. **Introductory.**—There are three statutory provisions relating to the execution of powers in cases where there are two or more donees; one of these statutes applies to all such cases, and the other two apply only when the donees are also executors or testamentary trustees, and hold the power as such.

§ 634. **First statute.**—"Where a power is vested in two or more persons, all must unite in its execution; but if before its execution, one or more of such persons dies, the power may be executed by the survivor or survivors." Real Prop. L., § 146. The reference in this section to the persons in whom a power is

vested, means the donees of the power. Real Prop. L., § 112. Where there are two or more donees, and the power is discretionary, all must act personally. *Whitlock* v. *Washburn*, 62 Hun, 369 (373); *Berger* v. *Duff*, 4 Johns. Ch. 368; but if no discretion is involved, one may delegate his power to the other, and the latter may execute for himself and also as the delegate of the other. *Ante*, § 593.

§ 635. Second statute.—"Where any powers to sell, mortgage, or lease real estate, or any interest therein, are given to executors as such, or as trustees, or as executors and trustees, and any of such persons named as executors shall neglect to qualify, then all sales, mortgages and leases under said powers made by the executors who shall qualify shall be equally valid as if the other executors or trustees had joined in such sale." Code C. P., § 2642. For discussion of the statute, see §§ 636, 637.

§ 636. Third statute.—"Where any real estate or any interest therein, is given or devised by any will legally executed, to the executors therein named, or any of them, to be sold by them or any of them, or where such estate is ordered by any last will to be sold by the executors, and any executor shall neglect or refuse to take upon him the execution of such will, then all sales made by the executor or executors, who shall take upon them the execution of such will, shall be equally valid, as if the other executors had joined in such sale." 2 R. S. 109, § 55.

This right of the one who does qualify, under the foregoing statutes (§§ 635, 636), to execute the power given to "the executors," applies equally whether the direction to sell is imperative or is left to the discretion of the executors, *Leggett* v. *Hunter*, 19 N. Y. 445 (455, and cases there cited); *Taylor* v. *Morris*, 1 N. Y. 341 (349); and "in this respect the statute makes no distinction between a devise to sell and a bare authority." *Id.* 350. But the executors who qualify must all unite to convey land under such a power. One of them cannot do so without the others, unless power is given to him specially in the will. *Wilder* v. *Ranney*, 95 N. Y. 7; *Berger* v. *Duff*, 4 Johns. Ch. 368. And this is so though the power is such as to equitably convert the land. All who qualify must unite to effect the

actual conversion. *Wilder* v. *Ranney*, 95 N. Y. 7. Those who do not qualify need not join. *Ogden* v. *Smith*, 2 Pai. Ch. 195; *M. L. Ins. Co.* v. *Woods*, 121 N. Y. 302; *House* v. *Raymond*, 3 Hun, 44 (51). The statutes also cover the case of the death of one or more executors and the execution of a discretionary power by the survivor. *Carroll* v. *Conley*, 9 N. Y. Supp. 865, aff'd 124 N. Y. 643. See *ante*, § 634. Where a power of sale is given to such of several executors named as shall qualify and take on themselves the burden of administration and three qualify and two of the three subsequently execute a deed, the facts *might* show a renunciation by the third, so as to validate the deed. As to facts *pro* and *con*, see *Fleming* v. *Burnham*, 100 N. Y. 1. *Ante*, § 124. The statute, 2 R. S. 109, § 55, applying to devises, etc., to executors to be sold, and where one neglects or refuses to take upon himself the execution of the will, giving power to the other to sell, is applicable where the will does not devise to them in terms "to be sold," but only to demise as much as they think proper, and to sell as much as they think proper. In this instance there were indications that a sale would probably be necessary to carry out all the provisions of the will. A sale by the one acting executrix is in such a case valid. *Niles* v. *Stevens*, 4 Den. 399.

§ 637. **Statutes compared.**[1]—The reference in the provisions quoted from the Code and the Revised Statutes, to sales, mortgages, and leases, cover not only the making of the sale, etc., in its restricted sense, but to the execution of the instruments of conveyance, etc. *Bunner* v. *Storm*, 1 Sandf. Ch. 357 (360); and *vice versa*, it is undoubtedly true that the provision above quoted from the Real Property Law, referring to the execution of the power, covers the making of a valid contract of sale, etc. See *ante*, § 625.

The first statute above quoted applies to all powers, whether beneficial or in trust; the second and third apply only to powers in trust, and not even to all of them, but only to such as are created by will and give the power to the executors as such, or

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[1] For a comparison of the foregoing statutes, see *Ogden* v. *Smith*, 2 Pai. Ch. 195, and *House* v. *Raymond*, 3 Hun, 44.

as trustees. The first also refers only to the case where one or more of the grantees *dies*, and says nothing of refusal to accept the power, or of resignation or removal; and while the second and third refer only to the case where one of the executors or trustees refuses or neglects to qualify or to take on himself the execution of the will, and says nothing in express terms of his death, resignation or removal. The decisions upon the scope of these provisions are somewhat meagre. This much, however, may seem clear, that the provision of the Real Property Law (§ 146) is general in its terms, and includes the case where one of two or more executors holding a power *dies*, thus supplementing the provisions of the Revised Statutes and the Code to that extent. But the latter provisions are specific, and cannot be relied on to cover the case of grantees who are not executors or executors and trustees. None of the three provisions refers in terms to resignation or removal. It has accordingly been held that where one of several executors resigns, or is removed, the survivors cannot execute a power given to all, in *Matter of Van Wyck*, 1 Barb. Ch. 565 (569–570), but that the court may, in a case where the power is of such a character as to pass to a successor, appoint a new trustee or administrator to act with the original ones who remain, in executing the power. *Id.* But in *Matter of Bernstein*, 3 Redf. 20 (25 *et seq.*), the ground is taken that where one resigns the others may execute the power. And such seems to be the necessary implication from the reasoning of the court in *Fleming* v. *Burnham*, 100 N. Y. 1 (10 *et seq.*), where, though renunciation was not there sufficiently established, the court assume that the resignation of one who has once qualified, leaves the others competent to execute the power; and they say "If he qualified as executor, and, with his co-executors, Thomas McKie and Andrew Stark, undertook the burden of the will, and was not subsequently discharged, or did not renounce his executorship, or refuse to act as executor, then it seems to be conceded that the power of sale was not well executed by the conveyance of his two co-executors, in which he did not join" (p. 10). And in *Bunner* v. *Storm*, 1 Sandf. Ch. 357 (360), it was held that if one renounces the others may act, but it does not appear whether the "renunciation" occurred after qualifying. In *Roseboom* v. *Mosher*, 2 Den. 61 (68), it was held that a neg-

lect or refusal by one of two executors who had qualified, to take upon him the execution of the will, even though he should not formally resign, would enable the other to convey. See also *Sharp* v. *Pratt*, 5 Wend. 611. The provisions of the two statutes under consideration do not override clear provisions of the will that both the executors must act. *Herriott* v. *Prime*, 87 Hun, 95. Thus, if the will specifically requires that both the executors must consent and unite in effecting a sale, and that neither can act alone, then if one renounces, it has been held that the power could not be exercised by the other. *Hyatt* v. *Aguero*, 56 Super. Ct. 63. Another point to be noticed is the following distinction between the two statutory provisions above quoted from the Code (§ 2642) and the Revised Statutes (2 R. S. 109, § 55), namely, that the former speaks of a *power to sell;* the latter, under one branch, of a *devise of land to be sold;* and under another branch, of a direction that the land be sold; under the former statute the executors have a mere power; the latter, under its first branch, purports to give them title, and does so if the sale is for a purpose for which an express trust may be created, and if they are also empowered to receive the rents and profits (Real Prop. L., § 77). The statute 21 Hen. 8, Ch. 4, provided that where part of the executors having a *power to sell* refused to assume administration and charge of the will, a sale by those accepting and taking charge should be valid, and the courts extended its scope to cover *devises* of land to executors *to be sold*. *Roseboom* v. *Mosher*, 2 Den. 61 (69). But under our statutes, in one case (Code, § 2642) neglect to *qualify* is the test of capacity in the other grantees, and in the other case (2 R. S. 109, § 55) it is either *neglect or refusal* to assume the execution of the will, and renunciation is not necessary to bring the statute into operation. *Taylor* v. *Morris*, 1 N. Y. 341. As to the former distinctions between a devise "to sell" and a devise that the executors shall sell; or that the land shall be sold by the executors; or a devise of land to be sold by the executors, see Farwell on Powers (2d ed.), 68–69. How far the history of these provisions, and the variation in phraseology, may color the decisions, it is difficult to say. But see *Taylor* v. *Morris*, 1 N. Y. 341. It is to be regretted that the recent revision has not cleared up the difficulties thus presented.

§ 638. **Summary.**—The general results of the foregoing discussion may be summed up as follows: (*a*) Where a power to sell, mortgage, or lease is held by executors, as such, or as trustees, or as executors and trustees, the neglect of any to qualify devolves the power on the others or other (Code, § 2642). (*b*) When land is devised to executors to be sold, the neglect or refusal of any to assume the execution of the will, likewise devolves the power on the other or others (2 R. S. 109, § 55). (*c*) The last cited section also provides that where "such estate" is "ordered" by the will to be sold by the executors, like neglect or refusal shall effect a like result. These references to "such estate," and the "order" are obscure. The meaning might be to raise a distinction between a devise of land to be sold, and a mere order that it be sold, not accompanied by a devise; or a distinction between a devise of land to be sold and a devise accompanied with an order that it be sold. See *ante*, § 552 *a*. Both distinctions are recognized by early English cases. (*d*) Where some of the executors renounce, the others succeed to the power. (*e*) Where they resign after qualifying, the same result follows. (*f*) Where any of the executors is removed, the question whether this may be classed as a refusal or neglect to act seems undecided. (*g*) Where one or more of the donees, whether executors or not, dies, the power may be executed by the survivor or survivors. Real Prop. L., § 146. (*h*) Where any of the donees resigns, or is removed, the Supreme Court, or in a proper case the Surrogate's Court, may appoint a successor to join in the execution of the power (unless the execution is by the terms of the instrument, or by its nature, personal to the original grantees). Real Prop. L., §§ 92, 162. (*i*) Where the last surviving grantee dies, resigns or is removed, etc., the Supreme Court, or, in a proper case, the Surrogate's Court, may, under similar circumstances, appoint a successor. Real Prop. L., §§ 91, 92, 162; Code C. P., § 2643. On the substitution of a new trustee of the power in case of death, resignation, renunciation or removal, see *Cooke* v. *Platt*, 98 N. Y. 35 (39); *Leggett* v. *Hunter*, 19 N. Y. 445; *Roome* v. *Philips*, 27 N. Y. 357 (363). Every instrument creating a power should be so drawn as to cover these points by its terms, and provide for devolution in case of vacancy from any cause. Upon the subject of the devolution of a power

in case of a vacancy, see also *ante*, §§ 120 *et seq.*; 330 *et seq.*; 597 *et seq.* ; *post*, § 726.

§ 639. **Ratification.**—If a power in two be executed by one only, it may be ratified by the other, but not by parol ; the ratification must be in the same form required for an original execution. *Whitlock* v. *Washburn*, 62 Hun, 369 (374) ; *Newton* v. *Bronson*, 13 N. Y. 587 ; *Haydock* v. *Stow*, 40 N. Y. 363 (371). But as to delegation of powers, see *ante*, § 593.

§ 640. **Liability of donee joining.**—As to the liability of a donee who joins in the execution of a power in trust, while the other receives the purchase price, see *Croft* v. *Williams*, 88 N. Y. 384 (390). And *ante*, § 275 *et seq.*

(3) *Consent of Third Person.*

§ 641. **The statute.**—" Where the consent of two or more persons to the execution of a power is requisite, all must consent thereto ; but if, before its execution, one or more of them die, the consent of the survivor or survivors is sufficient, unless otherwise prescribed by the terms of the power." Real Prop. L., § 154. This section is new, and went into effect October 1st, 1896. Heretofore the general statement of the rule has been that the death of one or more of several persons whose consent was requisite to the execution of a power, *per se* rendered execution impossible. *Barber* v. *Cary*, 11 N. Y. 397 (400–401) ; *Kissam* v. *Dierkes*, 49 N. Y. 602. And it is still true, under the new statute, that the death of a sole third person, or of all of the third persons, whose consent is required, renders it impossible to execute the power. On these points the facts in *House* v. *Raymond*, 3 Hun, 44, were peculiar. There testator appointed his wife executrix and two others executors, and gave to "my executors" power to sell " whenever they and my wife shall unanimously think that such sale will be advantageous," etc. It was held that after the death of the wife the executors could exercise the power. If the wife was mentioned not *as* wife, but as executrix, so that testator's meaning was that the power should be exercised " whenever my executors and executrix shall unanimously think," etc., then the case would not present any illustration of the re-

quirement of a consent by a *third person*, and would fall within the statute authorizing sales by surviving executors. And this seems to be the view adopted by the court. The requirement of consent by a third person may be conditional. Thus, if a power of sale be given "to my executor, with the consent of my wife, and of my [two] sons if of full age," here, while the sons are under age, the power may be exercised with the consent of the wife only, and if one son is over and one under age, with the consent of the wife and the adult son. *Hamilton* v. *N. Y. Stock E. B. Co.*, 20 Hun, 88. And the conditional nature of the requirement of a consent need not be express ; it may be implied. Thus, where a testator gave all the net income to his wife for life, but gave to his executors a power to be exercised with her consent the exercise of which would result in impairing her income, it was held that her death did not render impracticable an execution of the power, for it was evidently with the view of leaving it to her to pass on the question of reducing her income for the benefit of another, that her consent was required, and the reason ceasing, the requirement ceased. As construed, the provision was that the wife's consent should be necessary if she were living. In the cases cited, the wife died before the testator. *Kimball* v. *Chappel*, 27 Abb. N. C. 437 ; *Odell* v. *Youngs*, 64 How. Pr. 56 ; *Phillips* v. *Davies*, 92 N. Y. 199.

Under the law as it stood prior to October 1st, 1896, it was held that if the two persons whose consent is required are respectively trustees of two separate estates, and must consent in that capacity, and one of them dies, and the trust represented by him devolves upon the Supreme Court, the consent of the court must be procured in addition to that of the other trustee. *Correll* v. *Lauterbach*, 14 Misc. 469, aff'd Daily Law Journal, Dec. 15, 1896, p. 1 ; see *post*, § 726 ; and it might seem that even under the present rule the same principle would apply. For in such a case, though the individual is dead, the office which he held, and by virtue of which he was to consent, is not vacant. For the method of reasoning and principles of construction applicable where the persons whose consent is required are indicated by the use of a general term such as "my heirs," which might be employed in either a technical or an untechnical sense, see *Hoyt* v. *Hoyt*, 85 N. Y. 142 (151).

§ 642. **Consent—Absolute power.**—The consent of a third person may be validly required not only when the power is in trust, but also when it is beneficial, and though also general. *Barber* v. *Cary*, 11 N. Y. 397 (402). But nevertheless, the requirement of another's consent negatives the idea of an absolute power of disposition such as confers a fee on the grantee of the power. *Matter of Frothingham*, 63 Hun, 430. *Ante*, § 579.

§ 643. **Consent, how evidence.**—"Where the consent of the grantor or a third person to the execution of a power is requisite, such consent shall be expressed in the instrument by which the power is executed, or in a written certificate thereon. In the first case, the instrument of execution, in the second, the certificate, must be subscribed by the person whose consent is necessary; and to entitle the instrument to be recorded, such signature must be acknowledged or proved and certified in like manner as a deed to be recorded." Real Prop. L., § 153. *Barber* v. *Cary*, 11 N. Y. 397 (401), and see *Behrman* v. *Von Heyn*, 15 N. Y. Supp. 604. This statute, in force from October 1st, 1896, varies somewhat from that for which it was substituted. In the first place, the question whether, if the person whose consent was required was the grantor of the power, he was to be considered a "third person," under the section requiring the consent of a "third person" to be expressed in the instrument, etc., had been left as perhaps an open question, though the Court of Appeals had expressed a decided conviction that the term third person would cover the grantor in such a case. *Kissam* v. *Dierkes*, 49 N. Y. 602 (605). The present provision, Real Prop. L., § 153, lays this possible doubt at rest by providing that "Where the consent of *the grantor or* a third person," etc. But in view of the clear exposition of the grounds of its opinion by the court in the case last cited, it is most unfortunate that the revisers did not say "Where the consent of a third person, whether the grantor or another, is required," etc. For its immediate purpose the phrase adopted suffices, but it imbeds in the statute a vicious and illogical declaration that the grantor is not a "third person" in questions involved in the execution of the power—a principle likely to make trouble in some other connec-

tion. Another change in the statute is found in the provision that the instrument containing the consent (whether that instrument be the same one by which the power is executed, or a written certificate thereon) *must be subscribed* (instead of *shall be signed*), by the person whose consent is required. The distinction between signing and subscribing has been rendered familiar enough in the law of wills. But it remains to be determined whether any distinction is intended between *must* and *shall*. It is to be noticed that under the prior statute, providing that the third party *shall* sign, the courts had held that an execution of the power might be good in equity though no actual signing had taken place. Thus, under a power in A to sell with the consent of B, A conveyed the land to B (the "third person") in trust; B accepted the deed, but his consent, though given, was oral. Subsequently B sold to C for a valuable consideration. C then brought suit to compel B to execute the statutory consent to the original conveyance. The court held that such a suit would lie and that it would also lie where a conveyance had been made directly to an outside purchaser for value, on the oral consent of the "third person" whose consent was requisite. *Barber* v. *Cary*, 11 N. Y. 397; *Behrman* v. *Von Heyn*, 15 N. Y. Supp. 604. In view of this decision, it is hard to feel sure that the courts can treat as immaterial the subsequent change of the statute to provide that where consent is requisite the instrument or certificate *must* be subscribed by the third party. The final change in the section is effected thus: Instead of saying, with the prior law, that to entitle the instrument to be recorded, the signature of the third person must be duly proved or acknowledged in the same manner as if subscribed to a conveyance of lands, it says that the signature "must be acknowledged or proved and certified in like manner as a deed to be recorded."

(4) *Failure to Recite Power.*

§ 644. **The statute.**—"An instrument executed by the grantee of a power, conveying an estate or creating a charge, which he would have no right to convey or create, except by virtue of the power, shall be deemed a valid execution of the power, al-

though the power be not recited or referred to therein." Real Prop. L., § 155.[1]

The principle embodied in the statute above quoted applies to personal as well as real property. *White* v. *Hicks*, 33 N. Y. 383. See *post*, §§ 652, 765 *k*. For a comparison of this statute with Real Prop. L., § 156, see *post*, § 648.

§ 645. **Scope of Statute.**—The statute above quoted, as incorporated in the Revised Statutes and now re-enacted with certain immaterial changes in phraseology, was not intended to change the principle theretofore established. *Mut. Life Ins. Co. of N. Y.* v. *Shipman*, 119 N. Y. 324; *White* v. *Hicks*, 33 N. Y. 383. Under that principle, whenever a single power exists, under which the donee may convey or mortgage real estate, his conveyance is attributable to the exercise of the power actually possessed by him. *Mut. Life Ins. Co. of N. Y.* v. *Shipman*, 119 N. Y. 324; *Warner* v. *Conn. Mut. L. I. Co.*, 109 U. S. 357. But whenever, in addition to a power, he is also invested with other independent interests, whether legal or equitable, with respect to the same property, under the authority of either of which he may act, the rule of the statute should not apply. Thus where an executrix with power of sale and mortgage, and having also a consummate dower right (not yet admeasured), mortgaged the land, it was held that it must be taken to have been her dower right only to which the mortgage applied. *Mut. Life Ins. Co. of N. Y.* v. *Shipman*, 119 N. Y. 324. The other interest must however be effectual to create a transfer, and thus persuasive in furnishing a motive or reason for making or receiving a particular conveyance, and affording circumstances from which the imputation of a legal intent might be derived. *Id.*, p. 332. Therefore the possession by the donee of an *inchoate* right of dower would not, apparently, offset the statute (*Id.*, p. 333), for such an interest is unassignable (except by way of release to one having or then receiving an independent interest in the land). *Marvin* v. *Smith*, 46 N. Y. 571. The general

[1] In Farwell on Powers (2d ed.), 199, it is said that "the onus of proving the intention to execute a power voluntarily is on the volunteer; but if the person alleging the execution is a purchaser, the presumption is in his favor."

principle would apply where one had power to dispose by will of a fund to the income of which he was entitled for life. *White* v. *Hicks*, 33 N. Y. 383.

It will be noticed that under the provision above quoted, two questions of fact lie at the threshold of the application of the rule: (*a*) It must appear that the property conveyed or charged is the same property affected by the power. (*b*) It must appear that apart from the power he would have had no right to convey or charge it. These points may sometimes be left in doubt so far as the face of the will goes. Thus, under the first point one who had power to dispose by will of a certain fund of $50,000, and who had also considerable property of her own, made a will giving $50,000 to her husband, legacies to other persons amounting to $32,000, and also containing a general residuary clause. She did not recite the power, and in order to bring the case within the terms of the statute it became necessary to show that the $50,000 referred to was the fund over which she held the power. The court held it proper to admit evidence to show that her own property only amounted to $54,000, that she well knew the amount of her estate, and that she executed the will when she knew herself to be *in extremis*. These facts being shown, it was held that the $50,000 referred to in the will was the fund in question, and thereupon the statute became applicable to sustain the disposition of it, though the will did not recite the power. *White* v. *Hicks*, 33 N. Y. 383; *Lee* v. *Simpson*, 134 U.S. 572. See *post*, § 648. But declarations of the grantee of the power are not admissible to prove an intent to execute the power by the will. *White* v. *Hicks*, 33 N. Y. 383 (387–388). See *post*, § 649. On the second point above referred to, it is of course competent to show the existence or non-existence of a right, apart from the power, to convey or charge the property in question. See the cases above cited.

The remarks of the court in *Whitlock* v. *Washburn*, 62 Hun, 369 (373), though relating to a case where there were two donees, only one of whom had executed the contract to convey, might imply that if a sole donee (being an executor) should execute a deed or contract in his own name, under seal, and not reciting the power, it must be construed to be his individual act, and not an execution of the power, even though he had no right to con-

vey, except under the power. If this idea was intended, it is not in accord with the authorities. Real Prop. L., § 155. *Mut. Life Ins. Co. of N. Y.* v. *Shipman*, 119 N. Y. 324; *Roarty* v. *McDermott*, 146 N. Y. 296 (301); *Wright* v. *Syracuse, Ontario & N. Y. R. R. Co.*, 92 Hun, 32 (35). Apparently, however, all that was intended was that if, in the case of a power capable of delegation, one donee acts, in executing it, both for himself and as the delegate of the other, the instrument must, if under seal, show that he is acting as such delegate, *Stone* v. *Wood*, 7 Cow. 453; *Guyon* v. *Lewis*, 7 Wend. 26; *Townsend* v. *Hubbard*, 4 Hill. 351. And see *Myers* v. *Mut. L. I. Co.*, 99 N. Y. 1.

§ 646. **Misrecital.**—The fact that a donee of a power misrecites the source of his authority, as by saying that he executes it under a certain codicil to a will, instead of saying that he does so under the will itself, does not prevent its being a valid exercise of the power actually given in the will, if that appears to be his meaning. *Austin* v. *Oakes*, 117 N. Y. 577 (595). But, on the other hand, if the donee of a power expressly recites in a deed of conveyance, that he thereby proposes to exercise *another* power (which he erroneously believes to have been given to him), and has no intention of executing the actual power in question (which has in fact been given to him), the instrument will not operate as an execution of the latter power. Thus a will gave to a trustee a general power of sale. Not knowing that it applied to certain land in question, he secured from the court an order authorizing a sale thereof, which order was in fact unauthorized and invalid. He then conveyed by a deed which stated that it was executed in pursuance of the authority conferred by the order. Subsequently, on learning of the invalidity of the order, and the sufficiency of the power created by the will, he conveyed again to the same grantee, reciting the latter power. It was held that the first deed was not a valid execution of the power, under the statute above quoted, but that the second deed was valid. *Pollock* v. *Hooley*, 67 Hun, 370.

(5) *Effect of a General Devise.*

§ 647. **The statute.**—"Real property embraced in a power to devise passes by a will purporting to convey all the real prop-

erty of the testator, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication." Real Prop. L., § 156 ; *Kibler* v. *Miller*, 57 Hun, 14 ; aff'd 141 N. Y. 571 ; *Hutton* v. *Benkard*, 92 N. Y. 295 ; *Mott* v. *Ackerman*, 92 N. Y. 539 (549) ; *Van Wert* v. *Benedict*, 1 Bradf. 114 ; *Thomas* v. *Snyder*, 43 Hun, 14.

§ 648. **Compared with failure to recite.**—This statute differs from that just discussed, *ante*, §§ 644, 645, 646, in this : That statute deals with a case where (*a*) the donee of a power conveys an estate or creates a charge, which he has no right to convey or create except under the power ; (*b*) he fails to recite the power ; (*c*) the instrument executed by the donee may be any instrument competent to execute the power, and is not confined to a will ; and (*d*) it may or may not purport to transfer all the donee's property. The questions under that statute are, first, whether the property conveyed or charged is the property over which the power exists ; and second, whether there was an absence of right in the grantee to so convey or charge it except under the power. If these questions are answered affirmatively, then the instrument is deemed a valid execution of the power, although the power is not recited or referred to therein. The other statute just quoted, however, deals with a different case, namely, one where a testator who holds a power to dispose *by will*, devises *all* his real property, or *all* his personal property ; in such a case the devise executes a power over land, and the bequest executes a power over personalty, unless a contrary intent appear, either expressly or by necessary implication. This section applies (1) only to testamentary powers ; (2) only where there is a disposition of all the property, either real or personal, as the case may be, of the testator ; (3) it is immaterial whether or not he has some interest in the property affected, which he could convey even apart from the power. In the former of these two sections, the fact that the donee is purporting to deal with property which he has no right to convey or charge except through the power, is relied on as a sufficient indication of intent to execute the power. As to the evidence admissible, see *ante*, § 645. In the latter section, the fact that he disposes of all his property (by will) is regarded, unless the contrary intent appear from the instrument, as controlling evi-

dence of an intent to dispose of all that he had a right to dispose of. As to the evidence admissible, see the following section.

§ 649. **Construction.**—In determining whether the testator by a general devise of all his real property, did or did not intend to execute a power vested in him, the will is to be read in the light of the surrounding circumstances ; *e.g.*, the amount of property he owned personally ; the fact that he knew that his own property was less than that of which the will purports to dispose, etc. *Hutton* v. *Benkard*, 92 N. Y. 295. See *ante*, § 645. In *Lockwood* v. *Mildeberger*, 5 App. Div. 459, testatrix had a power to appoint a remainder, if she died without issue. By her will she gave all the rest, residue and remainder of her property to her issue (which provision could not have been intended to execute the power), and in default of issue, all *said* rest, residue and remainder to her husband. It was held that she intended to give the husband only what she meant for her issue had she had children, and that the power was not exercised. See also *Stewart* v. *Keating*, 15 Misc. 44. But the declarations of the grantee of the power as to his intent are not admissible. *Hogle* v. *Hogle*, 49 Hun, 313. See *ante*, § 645.

§ 650. **Applies to general residue.**—The statutory term "all the real property," covers the case of a devise of all testator's estate not otherwise disposed of in the will. *N. Y. L. Ins. & T. Co.* v. *Livingston*, 133 N. Y. 125.

§ 651. **Applies to reserved power.**—So the statute applies where the power is one which testator had reserved to himself under some previous conveyance. *N. Y. L. Ins. & T. Co.*, v. *Livingston*, 133 N. Y. 125.

§ 652. **Applies to personal property.**—The principle embodied in the statute above quoted applies by analogy to a case where one having a testamentary disposition over personal property, disposes by will of all his personal property. *Hutton* v. *Benkard*, 92 N. Y. 295 (305) ; *Van Wert* v. *Benedict*, 1 Bradf. 114 ; *Bolton* v. *De Peyster*, 25 Barb. R. 539 ; *N. Y. L. Ins. & T. Co.* v. *Livingston*, 133 N. Y. 125 ; *Hogle* v. *Hogle*, 49

Hun, 313 (316); *Thomas* v. *Snyder*, 43 Hun, 14. See *ante*, §§ 644, 647.

§ 653. **After-acquired power.**—Farwell, in his Treatise on Powers (2d ed.), 222, says that "a general power of appointment may be well executed by a will executed previously to the *creation* of the power, and that too by a mere residuary gift," citing several English cases, and referring to two sections of the English Wills Act. Whether such is the rule in New York would appear to depend on the construction to be given to the section above quoted, and to the following: "Every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate, which he was entitled to devise, at the time of his death." 2 R. S. 56, § 5. This section renders applicable to real property, a principle which, even at common law, applied to personal property, Hawkins on Wills, 17; *Quinn* v. *Hardenbrook*, 54 N. Y. 83 (88), and has been construed to have a certain bearing on powers, *e.g.*, under a testamentary direction to executors "to invest in mortgages," etc., all the rest, residue and remainder of testator's estate, and pay the income to beneficiaries named, for a term, at the end of which the "principal sum" was to vest in designated remaindermen; after acquired lands were held to be covered, and to be subject to an implied power in the executors to sell, in order to invest. *Byrnes* v. *Baer*, 86 N. Y. 210. It is to be noticed that the statute does not confine its application, in terms, to lands of which the testator shall be seized at his death, but relates to lands which he shall then be "entitled to devise;" and that testamentary powers are to be exercised "by devise or will." Real Prop. L., § 147.

(6) *Disposition too Extensive.*

§ 654. **The statute.**—"A disposition or charge by virtue of a power is not void on the ground that it is more extensive than was authorized by the power; but an estate or interest so created, so far as embraced by the terms of the power, is valid." Real Prop. L., § 157. "Excess in the execution of powers consists

in the transgression either of the rules of law or of the scope of the power." Farwell on Powers (2d ed.), 285. See *post*, § 660 *et seq.*

§ 655. **Scope of statute.**—It will be noticed that the statute just quoted refers only to the second class of excess mentioned by Farwell. The other class, consisting in transgression of the rules of law, finds a conspicuous illustration in appointments which violate the rules relating to suspension of the power of alienation or ownership; and appointments tainted with fraud. This section applies to a case where the power has a given scope and the grantee thereof gives to his attempted execution of it a wider scope. This is also to be distinguished from the principle applicable to cases which superficially appear to raise a somewhat similar situation, namely, those where the instrument creating the power, being drawn in general terms, is broad enough to authorize (though not to require) an execution which would be illegal, but where the donee of the power in fact exercises it only within narrower, and legal limits. For example, if one creates a trust for one life, and gives to the beneficiary thereof power to appoint the remainder in trust, this power is broad enough, by itself considered, to authorize the donee to create a further trust for two lives more. So, with a general power to execute leases, or, under the statute authorizing a power to a life tenant to make a lease for twenty-one years, a power to execute them for "not exceeding 63 years." The fact that the donee might thus attempt an illegal exercise does not invalidate the power, nor his exercise of it within legal limits. These two classes of cases—an excessive execution, and an execution restrained within limits equal to the full legal, but narrower than the literal possible scope of the grant of the power, are entirely distinct and are dealt with on different principles. Both of them are illustrated in *Hillen* v. *Iselin*, 144 N. Y. 365 (380). Of the latter class a full discussion will be found in the following cases: *Hone's Ex'rs* v. *Van Schaick*, 20 Wend. 564 (566–567); *Crooke* v. *County of Kings*, 97 N. Y. 421 (445); *Hawley* v. *James*, 16 Wend. 60 (140, 175); *Baker* v. *Lorillard*, 4 N. Y. 257 (270); *Root* v. *Stuyvesant*, 18 Wend. 257, dissenting opinions, approved in *Hone's Ex'rs* v. *Van Schaick*, 20

Wend. 564 (567); Gray, "Rule against Perpetuities," 322; *Austin* v. *Oakes*, 117 N. Y. 577 (599). If an illegal exercise is not merely authorized within the phraseology used, but is rendered imperative, the direction and the power are of course void. See the same authorities. But even within the scope of the statute above quoted, and in cases where the appointment is partly good, and partly void as effecting undue suspension, or as tainted with fraud, it is clear that a too extensive, or an unauthorized disposition under a valid power, might nevertheless be wholly void because of the impracticability of separating its valid and invalid provisions. Thus under a devise for one life with power in the devisee to devise the property in trust for any or all of several persons named, if the donee should attempt to create a single trust to continue for the joint benefit of all the beneficiaries as long as any of them should live, there would be no way of sustaining the appointment in part. It was a power to appoint in trust, and the trust attempted is void *in toto*. See Chap. XXVIII. This principle is thus stated in Farwell on Powers (2d ed.), 298: "Where the boundaries between the excess and the execution are not distinguishable, the whole appointment fails," and (*Id.*, p. 432) "appointments cannot be severed, so as to be good to the extent to which they are *bona fide* executions of the power, but bad as to the remainder, unless (1) . . . (2) the court can sever the intentions of the appointor, and distinguish the good from the bad."

656. **Illustrations.**—The execution of a power is not defeated merely because it contains a provision in excess of the power which may be eliminated without disturbing the general scheme. *Hillen* v. *Iselin*, 144 N. Y. 365 (380), *e.g.*, under a power to appoint the persons for whom property should be held in trust by certain designated trustees, a devise of the land to other trustees in trust for certain persons, while invalid as a devise may be held valid as a mere appointment of beneficiaries. *Id.* Under a power to appoint, "not exceeding one half" of certain property, an appointment of "all I am authorized to give" carries the full one half. *Kane* v. *Astor's Ex'rs*, 9 N. Y. 113 (133–134). For further illustrations, see *post*, last paragraph of § 744.

§ 657. **Partial appointment to non-object.**[1]—Where there is a power to appoint (by will or by deed) to or among designated persons, and the excess in execution consists in appointing a particular estate to a non-object (*i.e.*, to some person other than those designated), with remainder to an object, the rule under the English law varies according as the appointment is by will or deed; for "an appointment by will of a particular estate to a stranger, with remainder to an object, is a good appointment in remainder; but the particular estate fails, and the subject of the power, during its continuance, goes to the persons entitled in default of appointment;" while "if the legal estate in land be appointed by deed to a stranger for life, with remainder to an object, in fee, the whole appointment fails." Farwell on Powers (2d ed.), 307–308. The distinction arises out of the necessity of supporting a legal remainder (in real property) by a precedent particular estate—a necessity which no longer exists in New York (Real Prop. L., § 27). In cases where the power enables the donee to appoint a future estate at all, and is discretionary, it would appear that the English rule above quoted in reference to testamentary appointments would apply in New York to appointments by either will or grant. But if the power is imperative (see *ante*, § 581), the rule quoted would here be affected by the sections providing that the performance of an imperative trust power will be compelled, Real Prop. L., § 137; and that if a trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as beneficiaries of the trust. *Id.*, § 140. It would appear that if, by a proper construction of the instrument creating the power, no authority existed in the donee to appoint merely a future estate, and that his duty was merely to designate the appointee, the latter, to whom a future estate was thus appointed, might thereupon take in fee, on the theory that while the designation was valid, the attempt to limit the effect of it was in excess of the power.

§ 658. **Attempted delegation—Appointment over to objects.**—"If the donee attempts [where he is not authorized] to

[1] See also *post*, § 660.

delegate his power, but does not appoint any estate in contravention of the power, and appoints, in default of the execution of the delegated power, to proper objects, this will be a valid appointment to them, the will being read as if the words purporting to delegate the power formed no part of it.'' Farwell on Powers (2d ed.), 311. It would appear that such a case would in New York be governed by principles similar to those just mentioned in the preceding paragraph.

§ 659. **Appointment both to objects and non-objects.**—So also in the case covered by the following English rule: "If the appointment be to persons some of whom are, and some are not, objects, and the appointment to the object is distinct and severable from that to the stranger, it will be valid, and the latter alone will fail;" Farwell on Powers (2d ed.), 312. But "if the appointment be to persons as a class, some of whom are, and some are not objects, and it is impossible to define how much of the appointment falls within the power and how much without it, the whole appointment will fail." *Id.*, 312–313. Under this and the two preceding sections, it would appear that, in connection with Real Prop. L., §§ 137 and 140, the question would generally be whether the appointment to objects could stand, *pro tanto*, the statutes operating upon the shares or estates appointed to non-objects; or should fail utterly, leaving the statutes to operate as to all; or should constitute a sufficient designation of persons, the law operating to recognize the designation but discarding the limitations, so that those designated should take all the property; and that the result would depend to a large extent on the circumstances of the given case. The same remarks would seem to apply to a case where, under a power authorizing an appointment to any of several persons, the donee appoints to one of them for life, with remainder to non-objects.

(7) *Fraudulent Execution.*

§ 660. **The statute.**—"An instrument in execution of a power is affected by fraud, in the same manner as a conveyance or will, executed by an owner or by a trustee." Real Prop. L., § 161. *Harty* v. *Doyle*, 49 Hun, 410; *McPherson* v. *Smith*, 49 Hun, 254; *ante*, §§ 584, 654, 657, 659.

§ 661. **General principles.**—This section applies both to beneficial and to trust powers. Under beneficial powers the fraud may be exercised either by, or against, the donee of the power. Under powers in trust, it may also be exercised against the persons for whom, or for some of whom, the power is to be exercised. In reference to this statute, powers in trust may also be divided into two great classes. Under the first, the donee is authorized to deal with third parties for the benefit of those interested under the power, as, to sell, mortgage, or lease. Under the second class, the donee is authorized to appoint estates, designate beneficiaries, effect partition, allot shares, or make distribution, etc. ; under such powers, the rights and interests of the beneficiaries, or possible beneficiaries, in the very property affected by the power, are confided to his care. In both classes, the same requirement of good faith, and freedom from fraud, is imposed. Irrespective of any changes in the system of trusts and powers in New York, and the fact that trusts and powers as they formerly existed have been abolished, the English cases on the subject of fraud in the execution of powers and trusts are still applicable by way of analogy and illustration. Though systems of law may change, fraud remains fraud.

§ 662. **Powers of sale, etc.**—The donee of a power in trust to sell may not convey for a nominal consideration, *McMurray* v. *McMurray*, 66 N. Y. 175 ; nor give the property away, *Smith* v. *Bowen*, 35 N. Y. 83 (87) ; nor convey to one of several beneficiaries of a power of sale, in settlement of a claim against the estate, *Russell* v. *Russell*, 36 N. Y. 581 ; nor convey to himself. *Ante*, § 611. *Boscowitz* v. *Held*, N. Y. L. Journal, Dec. 5, 1896, p. 1. The donee cannot trade and bargain with a beneficiary with a view of deriving any advantage to himself. *Post* v. *Benchley*, 48 Hun, 83 (90), appeal dismissed, 110 N. Y. 665. Where an executor, who is donee of a power, makes a collusive sale, he may be surcharged in his account with the difference between the price which he received, and the actual value of the property. *Matter of Vandevort*, 8 App. Div. 341 ; *Gardner* v. *Ogden*, 22 N. Y. 327 ; *Forbes* v. *Halsey*, 26 N. Y. 53 ; *Colburn* v. *Morton*, 1 Abb. Ct. App. Dec. 378. In a case of collusive purchase the beneficiary, or those who have succeeded to his rights, " can

either apply to have the sale set aside, or may affirm the sale and charge the purchaser with the actual value of the lands purchased, as was done in the notable case of *The York Buildings Association* v. *Mackenzie*" [8 Bro. Par. Cas. 42]. *Colburn* v. *Morton*, 1 Abb. Ct. App. Dec. 378.

§ 663. **Bona fide purchaser.**—Though the donee of a general power of sale exercises it for a wrong motive, and misappropriates the proceeds, these facts do not defeat the sale where the purchaser is not a party to the wrongdoing. *Rose* v. *Hatch*, 125 N. Y. 427 (434); Farwell on Powers (2d ed.), 429 and cases there cited; *post*, § 720. Concerning facts, appearing of record, sufficient to put a subsequent purchaser on notice that a conveyance under the power had been of a fraudulent character, see *McPherson* v. *Smith*, 49 Hun, 254; *Briggs* v. *Davis*, 20 N. Y. 15; s. c. 21 N. Y. 574; *Benedict* v. *Arnoux*, 7 App. Div. 1; *Boscowitz* v. *Held*, N. Y. L. Journal, Dec. 5, 1896, p. 1.

§ 664. **Setting aside sale.**—If a sale be made for an improper price, it cannot be set aside on motion, but only by an action putting the fact of collusion in issue. *Matter of Rider*, 23 Hun, 91 (93).

§ 665. **Fraudulent appointments, etc.**[1]—On this subject the English reports are full of valuable authorities. A person having a power in trust must exercise it *bona fide* for the end designated; otherwise the execution is corrupt and void. Farwell on Powers (2d ed.), 403. The fraud may exist though the donee's motives may be excellent, *i.e.*, constructive fraud will, like active fraud, vitiate the exercise of a power in trust to appoint. Thus, a father, being opposed to a proposed marriage of one daughter, settled his property on trustees in trust for his two daughters, or either, as his son should appoint, and in default of appointment, dividends to both, etc. There was also another trust with a similar power which figures in the same case below cited which was treated in the same manner and had the same history and the same result as in the one just specified. The son, with the in-

[1] See *ante*, §§ 654, 657, 659.

tention of carrying out his father's general wish of adapting the ultimate scheme to the circumstances, and after the death of the father, and the marriage of the sister in question, appointed the entire fund to the unmarried sister, Lady Harriet. He did not intend this to be an absolute appointment of the whole for the benefit of Lady Harriet only, but his idea was that by taking back suitable orders on the trustees, etc., from Lady Harriet, he could effect an accumulation of one half of the income, so as to hold it in abeyance for the general advantage of Lady Mary without giving her any absolute right in it. This appointment of the whole to Lady Harriet was not really intended to be wholly for her benefit, and she did not receive any notice that she had become the absolute appointee of the whole, and the appointment was made to her only in connection with taking back from her at the same time certain papers subjecting half the income to the supervision of the appointor. This scheme was attacked on behalf of Lady Mary, the married sister, and after hearing in the court below, the case was appealed. On this appeal (*Portland* v. *Topham*, 1 De G. J. & S. 517) the whole scheme of appointment was held invalid, Turner, L. J., saying, among other things : " When, therefore, it is asked that effect be given to an appointment which has for its object to go beyond the power, it is in truth asked that the unauthorized purpose of the donee may be preferred to the authorized purpose of the donor and that to the prejudice of those who would be entitled but for the donee's unauthorized purpose, and it is further asked that effect may be given to the severance of the power from the duty with which it is connected." The case then came on on appeal before the House of Lords (s. c. 11 H. L. C. 32). The case turned there on the point that Lady Harriet was not put in the possession of absolute control over the property appointed ; that no specific notice was given her to that effect, and that the donor reserved a power of revocation. The decision of the House of Lords was unanimous in sustaining the court below holding the appointment totally void. The opinions are of great value throughout, but among other things the judges made the following remarks :

Westbury, L. Chan. : " The settled principles of the law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall, at the time of the exercise of that

power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power. I think it would be endangering the whole of the established principles of our law upon this subject if we were to permit a transaction of this kind to stand, or to hold that it is a transaction which can be reconciled with the faithful, sincere, just and honest exercise of the power committed to the appointor, and which he is to exercise as a trustee."

Lord Cranworth said, if the appointment had really been absolute, to Lady Harriet, *bona fide*, it would have been good though she knew of the desired purpose ; but, as it was, he did not entertain a particle of doubt, it was invalid.

Lord St. Leonards . . . " A party having a power like this, must fairly and honestly execute it without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit for himself, directly or indirectly. It may be subject to limitations and directions, but it must be a pure, straightforward, honest dedication of the property, to the person to whom he affects, or attempts, to give it in that character. . . . Then the absolute appointments were executed which gave the property in form absolutely to Lady Harriet—but, mind, not in form even, until she had executed that order which gave the warrant to the bankers to continue to keep that money at all times in the way which was understood between the parties. She was no more an appointee of the funded property than I am. She was an agent, or a hand, made use of, for the purpose," etc. " My Lords, I confess I never saw a more naked case. There is really nothing to decide."

After this decision, the donor made a second attempt by doing the same thing over again, except that he had Lady Harriet notified of the absolute appointment to her, and omitted the power of revocation. This appointment was then attacked on the same grounds, and was held invalid as being in substance the same arrangement based on a practical *understanding* that Lady Harriet would in fact (though not bound) carry out the proposed

plan. On appeal, this was affirmed (*Topham* v. *Portland*, 5 Ch. App. 40) on the ground that it was, in reality, practically the same transaction ; as an attempt to nominally appoint to one and yet not ; or to appoint really for two, and yet not. The appointee was to an extent a dummy appointee (*Id.*, p. 58). A literal execution of the power, with a purpose which it does not sanction, is regarded as a fraud on the power (*Id.*, p. 59). As between a trustee and *cestui que trust* the burden is on the trustee (*Id.*, p. 61). Doubted by the Master of the Rolls, 10 Eq. 5 (9). Distinguished (and apparently approved) by the Court of Appeal in 3 Ch. D. 442, and followed in *Mackechnie* v. *Marjoribanks*, 39 L. J. Ch. 604, where there was an appointment by a donee having power to appoint among her children, to one daughter. The money was paid, by the trustee, on request of the appointee, into the appointor's bank account. Thereafter the appointee received a portion of it. Held that the whole appointment was void and the representatives of the trustee (deceased) must replace the trust fund. The fact that the appointment and the request to deposit in donee's account were simultaneous was notice to the trustee. "The mere fact that there are two pieces of paper cannot make any difference in the legal effect, and I must construe it in the same manner as if that letter had been set out in the deed of appointment."

Where one has a power in trust to dispose of property to, among, or between, two or more persons, and the terms of the power import that the estate or fund is to be distributed among the persons so designated, in such manner or proportions as the donee of the power thinks proper, the donee may allot the whole to any one or more of such persons in exclusion of the others. (Real Prop. L., § 138). But he cannot allot to other persons not so designated (*ante*, § 657 *et seq.*). Nor may he make an allotment to others under the cover of a mere nominal allotment to or among those designated. The principles on this subject, as established in England, seem to rest on general principles of duty and justice, and to be equally applicable here. Thus, in such a case, if the donee appoints absolutely and *bona fide* to any of those designated, the mere fact that he knew of the appointee's purpose to transfer the property, if appointed, to an outsider, is immaterial. The appointee has a right to deal with the property

as he chooses, if he gets it, and the donee's knowledge that he proposes to give it to a non-object, does not make the appointment an appointment to a non-object. *Pryor* v. *Pryor*, 2 De G. J. & S. 205. Thus, "an appointment to a child, an object of the power, and a contemporaneous settlement by him of the appointed fund, is valid, unless it can be shown that the appointment was made in pursuance of a contract inducing the appointment." Farwell on Powers (2d ed.), 417 ; *Goldsmid* v. *Goldsmid*, 2 Hare, 187 ; *Birley* v. *Birley*, 25 Beav. 299 ; *Thompson* v. *Simpson*, 1 Dr. & War. at p. 487.

But if there is an agreement that the appointee, if selected, will give the property to non-objects, and this agreement is the *sine qua non* upon which the appointment to the object is made, the appointment is invalid, as in substance an appointment to a non-object. *Pryor* v. *Pryor*, 2 De G., J. & S. 205 ; *Birley* v. *Birley*, 25 Beav. 299 ; *In re Turner's Settled Estates*, 28 Ch. D. 205 (217) ; *In re Crawshay*, 43 Ch. D. 615 (625) ; *Lee* v. *Fernie*, 1 Beav. 483 ; *Carver* v. *Richards*, 1 D., F. & J. 548 ; *Salmon* v. *Gibbs*, 3 De G. & Sm. 343 ; *Re Kirwan*, 25 Ch. D. 373 ; *Portland* v. *Topham*, *supra*. *In re Marsden's Trust*, 4 Drew. 594 (explained 43 Ch. D. 626 *et seq.*), the appointment was bad because made to an infant daughter on the understanding that when she came of age she should be informed that it had been so appointed in reliance on her making provision for her father. The plan for moral pressure in favor of a non-object vitiated the appointment. A power to appoint among a certain class cannot be so exercised, *e. g.*, by attaching a condition that the appointees release claims, etc., as to in reality constitute the appointment one for the benefit of third parties. In such case it is all void. *In re Perkins* (1893), 1 Ch. 283.

But the mere existence of a contract between appointor and appointee does not avoid the appointment. "In order to do this, it must be shown that the contract induced the appointment, and that, but for the contract, the appointment would not have been made." Farwell on Powers (2d ed.), 419 ; *In re Turner's Settled Estates*, 28 Ch. D. 205. So the donee "cannot stipulate for any advantage to himself." Farwell on Powers (2d ed.), 415. *Daubeny* v. *Cockburn*, 1 Mer. 644 ; *Jackson* v. *Jackson*, 7 Cl. & F. 977. But "appointments are not

necessarily fraudulent because the appointor may possibly derive some benefit from them." Farwell on Powers (2d ed.), 409. *Re Huish's Charity*, L. R. 10 Eq. 5 ; *Pickles* v. *Pickles*, 31 L. J. Ch. 146 ; *Cockcroft* v. *Sutcliffe*, 25 L. J. Ch. 313 ; *Pares* v. *Pares*, 33 L. J. Ch. 215 ; *Baldwin* v. *Roche*, 5 Ir. Eq. R. 110 ; *Shirley* v. *Fisher*, 47 L. T. 109 ; *Cooper* v. *Cooper*, L. R. 5 Ch. 203. Mere suspicion of corrupt or improper motive in exercising a power is not sufficient, but suspicion is ground for jealous investigation. There must be enough proof to support a judicial inference, or conviction. *In re Marsden's Trust*, 4 Drew. 594 (599) ; *In re Crawshay*, 43 Ch. D. 615 (626).

(8) *Defective Execution.*

§ 666. **Of power in trust.**—When any given power is executed, a defect in the execution will be injurious to one or another of two distinct classes of persons, according to the nature of the case. In the first place, if it is a power in trust, the beneficiaries of the trust are affected, *e.g.*, where a power to appoint among a class, or to distribute, etc., has been defectively exercised. In such cases, the statute provides that " Where the execution of a *power in trust* is defective, wholly or partly, under the provisions of this Article [on Powers], its proper execution may be adjudged in favor of the person designated as the beneficiary of the trust." Real Prop. L., § 143.

667. **Of power, whether beneficial or in trust.**—On the other hand, whether the power is in trust or not, if it authorizes a conveyance, which has been defectively executed to a purchaser for value, he is affected by the defect. In such cases, the statute provides that " A purchaser for a valuable consideration,[1] claiming under a defective execution of a power, is entitled to the same relief[2] as a similar purchaser claiming under a defective conveyance from an actual owner." Real Prop. L., § 160 ; *Barber* v. *Cary*, 11 N. Y. 397, considered *ante*, § 643. Compare *Correll* v. *Lauterbach*, 5 Daily Law Journal, Dec. 15, 1896, p. 1.

§ 668. **Revisers' report.**—In their Report, the revisers of 1830 say : " The strictness of courts of law, in requiring a literal

[1] As to which see *ante*, §§ 76, 99.

[2] *Ibid.*, § 99 *et seq.*

observance of the most trifling forms, is not more remarkable, than the power assumed by the Court of Chancery, of dispensing, in some cases, with the most necessary. Indeed, there is nothing more calculated to excite our surprise than the extraordinary jurisdiction which has been exercised by courts of equity, in supplying the defective execution of powers. Thus, if it is expressly declared that the power shall be executed by a will, signed and published in the presence of three witnesses, so as to be sufficient in law to pass real estate ; terms showing not merely the intention, but the anxiety of the party, that the solemnities of the statute should be followed, yet they may all be safely disregarded if the devise is to a wife or a child. An actual owner devises his estate to one or more of his children in exclusion of the others, but the will is attested only by one witness, and the devise is void both in law and equity. The same person makes a similar devise with a similar defect in execution, by virtue of a power expressly enjoining an execution by will according to the statute. and the devise, though void at law, yet in spite of the intentions of the party granting the power, and of the Legislature, as expressed in the Statute of Wills, by the *fiat* of the chancellor is rendered valid (Sugden on Powers, 353, 361). We confess this has appeared to us a stretch of power that cannot be justified, and which considerations of a supposed equity are hardly sufficient to palliate. If the Court of Chancery may do this, we may well inquire what are the limits of its authority ? What may it not do ? . . . The present state of the law in relation to the execution of powers, leads us to attach a peculiar importance to the regulations that we have proposed on this subject. They rest on the principle, that the alienation of lands by means of a power should be governed by the same rules as their alienation by the legal owner ; and that where the general solemnities of law are observed, other formalities, though enjoined by the party, may be considered as immaterial, and be safely disregarded. These rules will not only render the system of alienation consistent, but as it seems to us, will relieve the execution of powers from any serious embarrassment, and by avoiding the extreme of rigor to which courts of law have been carried, remove any necessity or pretext for the interference of equity."

§ 669. **What is defective execution.**—In thus providing for perfecting defective executions, however, the statutes are not intended to override the proper scope, nature and conditions of the power itself. Thus if a power authorizes execution by will only, a deed is void (and *semble vice versa*). Real Prop. L., §§ 147, 148. See *Sneed* v. *Sneed*, Ambl. 64. But see *ante*, § 561 *et seq.* If it is to be executed on the happening of a given contingency, an attempted execution before that time is void. *Allen* v. *De Witt*, 3 N. Y. 276. *Ante*, § 627 (*e*). So an instrument purporting to execute a power, signed by one donee, where two are necessary, under a mistake of law in supposing one enough, cannot be reformed in equity to make it the act of both donees, the other never having heard of it until after it was signed. *Whitlock* v. *Washburn*, 62 Hun, 369 (373). In the case cited, a contract of sale was executed by one of two grantees of a power (executors); it was signed by him individually and was under seal. It was claimed that it might be treated as also the contract of the non-signing executrix, on the ground that she consented to its being made, and also ratified it. The court, assuming at this point the truth of these statements of fact, held that as it was under seal, parol proof was inadmissible to show that it was not the individual contract of the executor who signed it, and so that it must be regarded as not that of testator's estate nor of the executor as one of the donees of the power. *Whitlock* v. *Washburn*, 62 Hun, 369 (373). The case was rightly decided, as in fact there was no competent proof of due consent, ratification or delegation by the non-signing donee. In short, the statutes quoted do not apply to void executions, but only to defective executions. Thus, while all the donees must join in executing a power, yet if it is executed by one with the consent and approval of the others who fail to sign merely through ignorance of the law, or through mistake, due execution may be decreed. Compare *Whitlock* v. *Washburn*, 62 Hun, 369 (373), where, however, relief was denied, on the facts. And see *ante*, §§ 633 *et seq.*; 643. So a binding contract to convey, though not *per se* a complete execution, is regarded as such in equity, and a conveyance will be decreed. *Bostwick* v. *Beach*, 103 N. Y. 414 (421). *Ante*, § 625. "Equity relieves only against defects which are not of the essence of the power." Farwell on Powers (2d ed.),

330. It "will not aid a defective execution which, if effective, would be a fraud on the power," or a breach of trust. *Id.*, 332. In *Schenck* v. *Ellingwood*, 3 Edw. Ch. 175 (arising under a power created, it would seem, before the Revised Statutes), it was held that if the original instrument required a (beneficial) power to be executed in the presence of two witnesses, an execution thereof in the presence of one witness would be aided in equity, in favor of a purchaser for value. The present statutes (Real Prop. L., §§ 149, 150, 151, *ante*, §§ 626, 627) evidently take such cases out of the class of defective executions requiring aid in equity, and render them perfect executions *per se*.

(9) *Default in Execution.*

In the case of powers not in fact executed by the original donee, several questions arise :

§ 670. **Whether extinguished.**—Some powers inhere in the donee named exclusively, and if not exercised by him are extinguished. Such are (*a*) those where the terms of the power so provide ; (*b*) those where the same result flows from the nature of the power conferred, or the purpose for which it is created, or the prescribed method of its execution. Other powers, and among these are in general all powers in trust (where the trust instrument does not provide otherwise), and certain beneficial powers covered by statute, may be carried out by successors, or by the Supreme Court or a person appointed by it. *Delaney* v. *McCormack*, 88 N. Y. 174. Real Prop. L., §§ 91, 92, 112, 126, 135, 137–140, 142 ; *ante*, §§ 597, 604, 609.

§ 671. **Estate limited on default.**—"The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power." Real Prop. L., § 31.[1] "The exercise of a power of appointment divests (either wholly or partially, according to the terms of the appointment) the estates limited in default of appointment, and creates new estates. . . ." Farwell on Powers (2d ed.), 276.

[1] It is, of course, true that both the power and the alternative estate may be repugnant to a fee granted to the donee, and so void. Farwell on Powers (2d ed.), 64.

§ 672. **Execution after default.**—In the case of an imperative trust power, the failure of the donee to execute it does not extinguish it. "If the trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as beneficiaries of the trust." Real Prop. L., § 140; *Smith* v. *Floyd*, 140 N. Y. 337. See also Real Prop. L., §§ 137, 141, 162. *Ante*, § 670. If a class of beneficiaries is named, those entitled under the present section may be the representatives of those who formed the class at testator's death, or those who form the class at the time when the power should have been executed; the intent controls. *Delaney* v. *McCormack*, 88 N. Y. 174.

(10) *Void Execution.*

§ 673.—If the execution of the power is not merely "defective," but entirely void, still the abortive attempt does not annul the power to subsequently make a due execution. See *post*, § 688. But if an appointment is invalid through fraud, this fact has weight in determining whether a subsequent appointment may not also be tainted with fraud. See Farwell on Powers (2d ed.), 201–202, and cases there digested, and *Portland* v. *Topham*, *ante*, § 665.

(11) *Equitable Conversion.*

§ 674. **Introductory.**—The law of express trusts and powers varies in certain respects, according as the property affected is real or personal. (See *post*, Chap. XXXI.) In view of these differences, it is evident that the nature of the property affected by a given express trust or power is often of great importance, and may of itself determine whether a given scheme is valid or invalid. *Underwood* v. *Curtis*, 127 N. Y. 523 (535, 539), *e.g.*, the effect of alienage of the beneficial taker may be varied. *De Barante* v. *Gott*, 6 Barb. R. 492; see *Parker* v. *Linden*, 113 N. Y. 28 (37). For many other illustrations, see *ante*, §§ 43–47, 110, 111, 358, 363; *post*, Chapter XXXI.

§ 675. **General principles.**—In determining whether a given scheme of disposition does deal with real or with personal property, the mere fact of the actual form it wears at the creation of

the estate is not decisive. It is here that the doctrine of equitable conversion becomes important. Where there is an imperative direction to sell, here equity, on the principle of regarding that as done which ought to be done, considers the conversion as effected at the time when a sale ought to take place, whether the land is really sold then or not. *Underwood* v. *Curtis*, 127 N. Y. 523 (533 *et seq.*). This is called "equitable conversion." The equitable conversion may be of personalty into land as well as of land into personalty. *Thorn* v. *Coles*, 3 Edw. Ch. 330. See the authorities cited in the opinion in *Kane* v. *Gott*, 24 Wend. at 660. The leading principle is that an imperative direction, contained in the instrument creating the estate, to sell the land in question, equitably converts it into personal property. *Hatch* v. *Bassett*, 52 N. Y. 359; *Cottman* v. *Grace*, 112 N. Y. 299 (305); *Hood* v. *Hood*, 85 N. Y. 561 (570); *Asche* v. *Asche*, 113 N. Y. 232; *Robert* v. *Corning*, 89 N. Y. 225 (239); *Fisher* v. *Banta*, 66 N. Y. 468; *Moncrief* v. *Ross*, 50 N. Y. 431; *Greenland* v. *Waddell*, 116 N. Y. 234; *Marsh* v. *Wheeler*, 2 Edw. Ch. 156; *Gott* v. *Cook*, 7 Pai. Ch. 521 (534); s. c. on appeal, 24 Wend. 641 (650 *et seq.*) But not so as to affect its liability under the Taxable Transfer Act, *Matter of Sutton*, 3 App. Div. 208, aff'd 149 N. Y. 618. Conversion may be directed and may take place, either immediately upon the creation of the estate, or at a subsequent time designated in the instrument. *Savage* v. *Burnham*, 17 N. Y. 561 (569); *Vincent* v. *Newhouse*, 83 N. Y. 505 (511). Where the direction is for a future sale, the land remains in the meantime subject to the law of real estate. *Savage* v. *Burnham*, 17 N. Y. 561 (569). But from that time on, and whether an actual sale then takes place or not, *Savage* v. *Burnham*, 17 N. Y. 561 (569), the property is regarded as personal property, and where the time is left discretionary, and sales of parts may be made separately, here as each sale does occur, actual conversion takes place. See *Keller* v. *Ogsbury*, 121 N. Y. 362 (366). Thereafter the law concerning real property has no application.[1] Thus any trusts created are then judged of as trusts of personal property. *Kane* v. *Gott*, 24

[1] A direction to sell does not effect conversion as against an after-born child unprovided for by the will, etc. *Smith* v. *Robertson*, 89 N. Y. 555.

Wend. 641 (659); *Everitt* v. *Everitt*, 29 N. Y. 39 (71); *Wells* v. *Wells*, 88 N. Y. 323 (331); *Greenland* v. *Waddell*, 116 N. Y. 234; *Savage* v. *Burnham*, 17 N. Y. 561 (569); *Ogsbury* v. *Ogsbury*, 115 N. Y. 290.

Neither the time of the creation of the estate, nor any other definite time, need be specified. The time when the required sale shall take place may be left to the discretion of the trustees or others authorized and directed to sell. *Robert* v. *Corning*, 89 N. Y. 225 (239); *Greenland* v. *Waddell*, 116 N. Y. 234; *Fisher* v. *Banta*, 66 N. Y. 468; *Underwood* v. *Curtis*, 127 N. Y. 523 (535); *Fraser* v. *Trustees*, 124 N. Y. 479 (484). Such a provision may be consistent with immediate equitable conversion, *Lent* v. *Howard*, 89 N. Y. 169 (177); *Greenland* v. *Waddell*, 116 N.Y. 234; *Underwood* v. *Curtis*, 127 N.Y. 523 (535), and if the delay is merely for the convenience of the estate, as where the executor is directed to convert the land as soon as it can be done in view of the best interests of the estate, *Matter of McGraw*, 111 N. Y. 66 (113); *Graham* v. *Livingston*, 7 Hun, 11; *Hope* v. *Brewer*, 136 N. Y. 126 (134), or after the expiration of one year, *Marsh* v. *Wheeler*, 2 Edw. Ch. 156, see *Betts* v. *Betts*, 4 Abb. N. C. 317 (386 *et seq.*), the equitable conversion takes place at testator's death. *Matter of McGraw*, 111 N. Y. 66 (113); *Graham* v. *Livingston*, 7 Hun, 11; *Hope* v. *Brewer*, 136 N. Y. 126 (134). Thus this is true where the intent and direction of the testator to have the land sold is absolute, or "out and out" for all purposes, and to have the whole estate, real and personal, become united in one common money fund for the sole object of division and distribution, and the discretion of the executor in regard to the sale relates merely to the time when the actual sale shall be effected. *Stagg* v. *Jackson*, 1 N. Y. 206 (212); *Marsh* v. *Wheeler*, 2 Edw. Ch. 156. In order to effect a conversion, it is not essential that it should be "out and out" for all purposes. Where a testator directs the conversion of real estate for a particular, special purpose, such as distribution, the courts will regard it, so long as the purpose and object exist and continue, as of that species of property into which it was directed to be converted; and to the extent and for the purpose declared, it is to be treated as money, not land. *Bogert* v. *Hertell*, 4 Hill, 492; *Fisher* v. *Banta*, 66

N. Y. at 476–477 ; compare *Wright* v. *Trustees*, Hoffm. Ch. 202.

Although, as stated, a discretion may be reposed in the person directed to sell, concerning the time when sale shall be made, a mere discretionary power of sale does not effect conversion. *Matter of McComb*, 117 N. Y. 378 ; *Miller* v. *Wright*, 109 N. Y. 194 ; *Matter of Tienken*, 131 N. Y. 391 (408) ; *Clift* v. *Moses*, 116 N. Y. 144 (158). And the fact that a power is imperative in form is not conclusive. If it is seen to have been given for a particular purpose which has failed, the power expires. *Read* v. *Williams*, 125 N. Y. 560. Yet even here, in so far as, and when, a sale actually takes place under the power, conversion is effected. *White* v. *Howard*, 46 N. Y. 144 (166–167) ; *Van Vechten* v. *Keator*, 63 N. Y. 52 ; *Harris* v. *Clark*, 7 N. Y. 242 ; *Miller* v. *Wright*, 109 N. Y. 194 (199). As to the application of the doctrine of conversion to a surplus of the proceeds of sale not needed for the purpose for which sale was directed, see *Downing* v. *Marshall*, 1 Abb. Ct. App. Dec. 525 (543) ; *Van Vechten* v. *Keator*, 63 N. Y. 52 ; *Erwin* v. *Loper*, 43 N. Y. 521 ; *Parker* v. *Linden*, 113 N. Y. 28 (38).

In order to occasion equitable conversion, the direction to sell need not be given in express terms. It may be raised by implication. *Asche* v. *Asche*, 113 N. Y. 232 (235) ; *Power* v. *Cassidy*, 79 N. Y. 602 (613) ; *Lent* v. *Howard*, 89 N. Y. 169 (177) ; *Tillman* v. *Davis*, 95 N. Y. 17 (23) ; see *Hobson* v. *Hale*, 95 N. Y. 588 (598, 606) ; compare *Gourley* v. *Campbell*, 66 N. Y. 169 (172). Such a result follows for instance where there is, first, an express authority to sell, and where, secondly, a conversion is absolutely necessary to carry out testator's scheme. *Hobson* v. *Hale*, 95 N. Y. 588 (606–607) ; *Lent* v. *Howard*, 89 N. Y. 169 ; *Power* v. *Cassidy*, 79 N. Y. 602 ; *Miller* v. *Wright*, 109 N. Y. 194 (199) ; *Chamberlain* v. *Taylor*, 105 N. Y. 185 (194) ; *Sweeney* v. *Warren*, 127 N. Y. 426 (432) ; *Fraser* v. *Trustees*, 124 N. Y. 479 (485). But in regard to the latter requirement, where there is an express power, and the directions for division are such that in the absence of conversion there would be embarrassment, and perhaps serious reduction of the fund, and interference with the accomplishment of testator's designs, and the testator's intention to have the land sold appears

from the general provisions of the will, the doctrine of equitable conversion applies. *Power* v. *Cassidy*, 79 N. Y. 602 (614); and see *Tillman* v. *Davis*, 95 N. Y. 17 (23–24).

Although, as already stated, equitable conversion in all cases results only when the direction to sell, whether express or implied, is imperative, yet where the testator merely "authorizes" his executors to sell his real estate, but the provisions of the will are such that there is "no doubt" that he intended it all to be turned into money, equitable conversion takes place. *Phelps' Ex'r* v. *Pond*, 23 N. Y. 69; *Delafield* v. *Barlow*, 107 N. Y. 535 (540); *Lent* v. *Howard*, 89 N. Y. 169.

Where a conversion of real property into personal is directed for particular purposes, and those purposes fail, the land retains its original character, and, if undisposed of, descends to the heirs—*Gourley* v. *Campbell*, 66 N. Y. 169 (174); *Chamberlain* v. *Taylor*, 105 N. Y. 185 (194); *Parker* v. *Linden*, 113 N. Y. 28; *Sweeney* v. *Warren*, 127 N. Y. 426 (431), and cases cited; compare *Fisher* v. *Banta*, 66 N. Y. 468 (477); see also the discussion of this point in *Marsh* v. *Wheeler*, 2 Edw. Ch. 156 (159, 160)—that is, to those who were such at the time of testator's death. See *Greenland* v. *Waddell*, 116 N. Y. 234 (245); *Matter of Tienken*, 131 N. Y. 391 (408). Though a failure of the purpose in part only may not have this effect, see *Kearney* v. *Miss. Soc'y of S. P.*, 10 Abb. N. C. 274. Compare *Matter of Wangner*, 74 Hun, 352. The general tendency of the decisions is against an "out and out" conversion for all purposes. See *Hobson* v. *Hale*, 95 N. Y. 588 (606).

In certain circumstances, considered in another place, the exercise of "election" to take the land instead of its proceeds may effect a "reconversion" of the property into its original form. *Post*, § 691 *et seq.*; *Hetzel* v. *Barber*, 69 N. Y. 1 (12); *Greenland* v. *Waddell*, 116 N. Y. 234 (246); *Armstrong* v. *McKelvey*, 104 N. Y. 179 (183–184); *Prentice* v. *Janssen*, 79 N. Y. 478 (484 *et seq.*); *Parker* v. *Linden*, 113 N. Y. 28 (38); *Reed* v. *Underhill*, 12 Barb. R. 113; *Brink* v. *Layton*, 2 Redf. 79.[1]

[1] Further cases illustrating various phases of equitable conversion are: *Finley* v. *Bent*, 95 N. Y. 364 (367); *Wilder* v. *Ranney*, 95 N. Y. 7 (12); *Shipman* v. *Rollins*, 98 N. Y. 311 (326); *Chamberlain* v. *Chamberlain*, 43 N. Y. 424 (431); *Adams* v. *Perry*, 43 N. Y. 487 (497); *Fincke* v. *Fincke*, 53 N. Y.

§ 676. **Property of infant.**—The general principle, that if an infant's lands are sold, under judicial proceedings, the proceeds still retain the character of real property, does not apply to a case where a testator devises land to an infant subject to an imperative power of sale which effects equitable conversion. *Horton* v. *McCoy*, 47 N. Y. 21 (25, 26); *Wells* v. *Seeley*, 47 Hun, 109.

528; *Horton* v. *McCoy*, 47 N. Y. 21 (25); *Van Giessen* v. *Bridgford*, 83 N. Y. 348; *Morse* v. *Morse*, 85 N. Y. 53 (59); *Matter of Fox*, 52 N. Y. 530 (536–537); *Graham* v. *Read*, 57 N. Y. 681; *Ross* v. *Roberts*, 2 Hun, 90, aff'd 63 N. Y. 652; *Clift* v. *Moses*, 116 N. Y. 144 (157); *Henderson* v. *Henderson*, 113 N. Y. 1 (14); *Scholle* v. *Scholle*, 113 N. Y. 261 (270); *Matter of City of Rochester*, 110 N. Y. 159 (167); *Downing* v. *Marshall*, 23 N. Y. 366 (392–393); *Bramhall* v. *Ferris*, 14 N. Y. 41 (46); *Meakings* v. *Cromwell*, 5 N. Y. 136 (140); *Allen* v. *De Witt*, 3 N. Y. 276 (280–281); *De Barante* v. *Gott*, 6 Barb. R. 492; *Arnold* v. *Gilbert*, 5 Barb. R. 190; *Riley* v. *Diggs*, 2 Dem. 184; *Rauchfuss* v. *Rauchfuss*, 2 Dem. 271; *Gersen* v. *Rinteln*, 2 Dem. 243; *Carman* v. *Brown*, 4 Dem. 96; *Brink* v. *Masterson*, 4 Dem. 524; *Canfield* v. *Crandall*, 4 Dem. 111; *Jones* v. *M. E. Sunday-School*, 4 Dem. 271; *Matter of Vandervoort*, 1 Redf. 270; *Tickel* v. *Quinn*, 1 Dem. 425; *Graham* v. *De Witt*, 3 Bradf. 186; *Butler* v. *Green*, 65 Hun, 99; *Bogert* v. *Hertell*, 4 Hill, 492; *De Peyster* v. *Clendining*, 8 Pai. Ch 295 (305), aff'd 26 Wend. 21; *Van Vechten* v. *Van Veghten*, 8 Pai. Ch. 104 (129), aff'd 1 Sandf. Ch. 395; *Wood* v. *Keyes*, 8 Pai. Ch. 365; *McCarty* v. *Terry*, 7 Lans. 236; *Shumway* v. *Harmon*, 4 Hun, 411; *Bijur* v. *Bijur*, 49 Hun, 235; *Purdy* v. *Wright*, 44 Hun, 239 (240); *Grant* v. *Grant*, 3 Redf. 283.

CHAPTER XXII.

SUSPENSION OF THE POWER OF ALIENATION.

§ 677. **The statutes.**—The general subject of suspension, including the recent change in the statutes effected by Real Property Law, § 32, has already been discussed. (*Ante*, § 383 *et seq.*) At present, there is no statute providing, in terms, as the former one did, that "the absolute power of alienation shall not be suspended [for more than two lives, etc.] by any limitation or condition whatever" (1 R. S. 723, § 15, now repealed). The only prohibitory provisions applicable to Powers affecting real property are the following:

§ 678. **First statute.**—"*Every future estate* shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever" (for more than two lives, etc.). Real Prop. L., § 32. This section is a substitute for 1 R. S. 723, §§ 14, 15, now repealed. It is the future estate, therefore, that is now declared void. And as applied to powers, it is the future estate that is required, or may be created, in their exercise, that is void if it would or might effect an undue suspension. From this provision, we arrive at the result that, the future estate being void, the intermediate suspension occasioned by its existence, or possibility, as well as the power, and the instrument in execution of it, so far as involved in this invalidity, are also annulled. The statute relating to suspension of the absolute ownership of personal property, stands unrepealed (in 1896). *Ante*, § 387. The fact that the lives of more than two persons are designated in connection with the duration of a suspension is immaterial, if the provision is such that in any event the suspension cannot extend beyond two particular lives. *Bird* v. *Pickford*, 141 N. Y. 18.

§ 679. **Second statute.**—"The period during which the absolute right of alienation may be suspended, by an instrument in execution of a power must be computed, not from the date of such instrument, but from the time of the creation of the power." Real Prop. L., § 158. *Genet* v. *Hunt*, 113 N. Y. 158 (171); *Hillen* v. *Iselin*, 144 N. Y. 365 (378); *Mott* v. *Ackerman*, 92 N. Y. 539 (549); *Beardsley* v. *Hotchkiss*, 96 N. Y. 201 (204); *Dana* v. *Murray*, 122 N. Y. 604; *Belmont* v. *O'Brien*, 12 N. Y. 394 (404); *Everitt* v. *Everitt*, 29 N. Y. 39 (78); *Blanchard* v. *Blanchard*, 4 Hun, 287 (290), aff'd, 70 N. Y. 615; *Booth* v. *Bapt. Church*, 126 N. Y. 215 (240). The ruling on this point in *Frear* v. *Pugsley*, 9 Misc. 316 (322), is erroneous. As to the meaning of the term "the time of the creation of the power," see Real Prop. L., §§ 54, 120, 209.

§ 680. **Third statute.**—"An estate or interest cannot be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power." Real Prop. L., § 159; *Booth* v. *Bapt. Church*, 126 N. Y. 215 (240); *Fargo* v. *Squiers*, 6 App. Div. 485. The words beginning with "unless" have been substituted for the following: "which such person would not have been capable of taking under the instrument by which the power was granted."

§ 681. **Statutes compared.**—Sections 158 and 159 of the Real Property Law bring powers within the scope of the general provision contained in *Id.*, § 32. By § 158 the period during which the absolute power of alienation may be suspended by any instrument in execution of a power, must be computed from the time of the creation of the power. By § 159, no estate or interest can be given to a person by an instrument in execution of a power, unless it would have been valid if given or limited at the time of the creation of the power. Therefore, if a testator could not, by a direct devise, carry an estate to a devisee except by limiting the necessary suspension by two lives, neither could he do so through the agency and intervention of a power. *Booth* v. *Bapt. Ch.*, 126 N. Y. 215 (240).

§ 682. **General principles.**—Concerning the relation of powers to the suspension of the absolute power of alienation, the following distinctions are important: (*a*) Suspension may be due, in effect, though not under the literal phraseology of the present statute, to the *existence* of certain powers, in connection with other features, as, where a power is created to be exercised only at the end of a term not measured by two lives, in favor of a person who, for some reason (*e.g.*, because he is to be benefited only in a trust capacity or because his identity cannot be determined within the legal term), can neither release his rights nor join in a conveyance. Chaplin Susp. Pow. Aliena., §§ 297–299. *Trowbridge* v. *Metcalf*, 5 App. Div. 318. In such cases, the suspension is occasioned by the future and indefinite or otherwise inalienable interests thus created by the original instrument, and not by the instrument in *execution* of the power. (*b*) Suspension may be occasioned by the interests created not by the original instrument, but by the instrument in execution of the power, as, where the original instrument creates an express trust for one life, and also gives a discretionary and beneficial power to appoint the remainder. Here the original scheme is valid, and does not, in itself, raise up any future interests at all; and therefore, until the power is executed, there is no invalidity involved. If the donee of the power appoints upon a further trust for one life of a person in being at the creation of the power, this execution of the power occasions a (valid) suspension during the last-named life; and if the donee of the power appoints upon an express trust for two lives, the execution of the power effects an illegal suspension; for under the statute above quoted, the allowable term of suspension is to be computed from the time of the creation of the power, and counting from that date, it appears that the property would be tied up for three lives. But to both these classes the statute above quoted applies, for whether the original instrument is such as to require an illegal act in exercising the power, or the instrument in exercise of a power harmless in itself is so drawn as to attempt an illegal result, in the one case the power itself is illegal, because any execution of it would effect undue suspension, and in the other case the execution is illegal because it attempts such suspension. The fact that land is to be sold under a power, and the proceeds turned over to a benefi-

ciary not certainly ascertainable within the statutory period, renders the power, and the future gift, invalid, under both the statutes above quoted. Compare *Garvey* v. *McDevitt*, 72 N. Y. 556.

§ 683. **Illustrations.**[1]—While the test of suspension lies in the absence of persons competent to convey an absolute fee in possession, Real Prop. L., § 32 ; *Hope* v. *Brewer*, 136 N. Y. 126 (135) ; *Robert* v. *Corning*, 89 N. Y. 225 (228) ; *ante*, §§ 386, 387 ; yet if a trust is to continue until a power to sell is actually exercised, under a power to sell "within" a specified term of years, the presence of the power does not obviate undue suspension caused by the trust, as the act of sale is collateral to the trust, and while it might be exercised at any time, there is no legal term of two lives designated within which it must be exercised. *Underwood* v. *Curtis*, 127 N. Y. 523. A power to sell land which leaves the proceeds subject to the same fetters as the property sold, cannot obviate suspension. It renders the land alienable, but the proceeds are affected by suspension of ownership. *Allen* v. *Allen*, 149 N. Y. 280 (288). A power to hold and manage personal property, to sell, invest, receive income, etc., and within five years divide among such of certain persons named as shall be living at the time of actual partition or the then living children of such as are then deceased, appears to create a suspension, but if the title vests in the class defeasibly at testator's death, and on the death of any member before division his share then vests absolutely in his children or the surviving members, there is no *illegal* suspension. The same powers would not suspend the power of alienation of land, as such, because the power to *sell* exists. See *Henderson* v. *Henderson*, 113 N. Y. 1. And so where land is devised to five minors, and a power of sale is given to the executor, the exercise of which is forbidden until the majority of the youngest devisee, to which time distribution is postponed, the power is void, because no election could be made to take free of the power, and no absolute conveyance could be made during a legal term. *Matter of Butterfield*, 133 N. Y.

[1] For a general discussion of the relation of powers to suspension, and full illustrations of the principles involved, see Chaplin Susp. Pow. Aliena.

473. Compare the remarks in *Garvey* v. *McDevitt*, 72 N. Y. 556 (563–564); *Dana* v. *Murray*, 122 N. Y. 604 (613); *Cussack* v. *Tweedy*, 126 N. Y. 81; and *Buchanan* v. *Tebbetts*, 69 Hun, 81, where the fact that those in whom the title was vested, and for whose benefit the power was to be exercised, could at any time effect a sale free from the power, was held to obviate any suspension. But if the power is absolute, and there is also a mere advisory direction not to sell during a specified period not measured by lives, there is no suspension. *Deegan* v. *Wade*, 144 N. Y. 573. And a power to sell "as soon as convenient" does not involve suspension, *Hope* v. *Brewer*, 136 N. Y. 126 (135–136). A mere naked power of sale over land devised, not prescribing any time for its exercise, does not suspend the power of alienation. The time within which the power must be exercised is not prescribed by statute. It is a mere charge on land, and has no more effect than a mortgage. The whole fee may be conveyed by the devisees, subject to the power, or they may dispose of their claim to the proceeds of sale to be made under the power. *Blanchard* v. *Blanchard*, 4 Hun, 287, aff'd 70 N. Y. 615. So a mere power in trustees to sell land, and receive rents, may exist as to an entire estate though only part is in trust, the other part being vested absolutely. It appears not to suspend the power to sell, as the trustee may sell at any time. The vested part may be sold subject to the power. This power may in fact continue indefinitely, as, for four lives. *Cussack* v. *Tweedy*, 126 N. Y. 81. Compare *Underwood* v. *Curtis*, 127 N. Y. 523; *Blanchard* v. *Blanchard*, *supra*.

§ 684. **Statute inapplicable.**—If a certain estate less than fee is conveyed by an instrument, and subsequently the same grantor conveys a future estate in the same property, the statute may not apply. Thus (*a*) where one transfers property by deed to a trustee to hold for the grantor's life, on trust to receive and apply the rents and profits, and makes no disposition of the remainder, he may also, by another deed, or by will, grant or devise that remainder in trust for two other lives in being when the will, or the second deed, goes into effect. The two instruments are independent. The will, or the second deed, is not in execution of a power created by the first deed, but in execution of an inherent

power in the owner to dispose of the estate still vested in him. *Genet* v. *Hunt*, 113 N. Y. 158. (*b*) And where in such a deed in trust for the grantor's life, and not disposing of the remainder, the grantor in fact, but unnecessarily, reserves a general and unlimited power to dispose of the remainder, it seems that he may also by will or deed devise or grant that remainder in trust for two lives in being, because the power he exercises is still based on his right as owner, and is not derived from the power. *Genet* v. *Hunt*, 113 N. Y. 158. The situation is somewhat similar where there is a conveyance by the owner to another, in trust to reconvey, and the reconveyance contains a power to sell. Here, if the two instruments are contemporaneous and to be read together, the power to sell forms in effect a part of the original deed, and is not derived from the deed of reconveyance. *Belmont* v. *O'Brien*, 12 N. Y. 394 (405). (*c*) But if a grant contains a reservation of a mere right to appoint the remainder by will, coupled with a disposition of the remainder in default of such appointment, here the power being general but *not absolute*, depends for its validity on the deed in which it is reserved, and therefore the execution of it by will must be held to relate back to the date of the original deed in determining its validity. For the power of alienation of the remainder is suspended during the grantor's life—one life—already. *Genet* v. *Hunt*, 113 N. Y. 158. But compare *ante*, §§ 551 and 567.

CHAPTER XXIII.

POWERS OF REVOCATION.

§ 685. **Introductory.**—The subject of revocation covers three distinct topics. (1) The power in a donor, or some other person, to revoke a power previously created. (2) The power in a grantor, or some other person, to revoke a transfer of property previously granted; see *ante*, § 525. (3) The power in a donee to revoke an instrument previously made in execution of a power held by him.[1]

§ 686. **(1) Power to revoke a power.**—"A power, whether beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument creating the power." Real Prop. L., § 128. *Heermans* v. *Burt*, 78 N. Y. 259 (267); *Fellows* v. *Heermans*, 4 Lans. 230 (237). A power contained in a will is of course revoked, or rather never goes into effect, if the will itself, or the clause conferring the power, is revoked. But a codicil to a will conferring a power, will not revoke the power unless inconsistent with it. *Conover* v. *Hoffman*, 1 Abb. Ct. App. Dec. 429.

§ 687. **(2) Power to revoke a grant.**—A power to revoke may also be reserved in a conveyance to a trustee, or other grantee, but unless thus reserved, the trust is irrevocable. This subject has, for convenience, been treated already, under Trusts, *ante*, § 525. See also *post*, § 717.

"Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned." Real Prop.

[1] As to recording instruments effecting revocation, see *ante*, end of § 525.

L., § 125. See also *Id.*, § 231. A grantor to a trustee, may reserve to himself power to mortgage or convey, pending, and free from the trust; *i.e.*, a power to revoke the trust *pro tanto*. *Campbell* v. *Low*, 9 Barb. R. 585 (592–593).

§ 688. (3) Power to revoke instrument executing a power. —Where the donee of a power to dispose by will, executes a will accordingly, it is revocable, during his life, like any will. *Austin* v. *Oakes*, 117 N. Y. 577 (593–594); *Van Wert* v. *Benedict*, 1 Bradf. 114. Where the donee of a power to distribute by will executes a will in complete and valid exercise of the power, and later executes a codicil which attempts an illegal and void disposition of a portion, the latter disposition, being void as to its affirmative provisions, and containing no clause of revocation except that implied by the void substitutionary and inconsistent disposition, does not affect the validity of the original, complete and valid exercise of the power in the will itself. *Austin* v. *Oakes*, 117 N. Y. 577 (597 *et seq.*). The will and codicil being construed together as one instrument, the same rule would undoubtedly apply where there was only one testamentary instrument in execution of the power, which, after a complete and valid exercise thereof, contained an inconsistent and void substitutionary attempt to exercise it differently, as to part, where the latter disposition was clearly separate, and indicated merely an intention that it was to go into effect *if valid*, but that otherwise the preceding and complete disposition was to hold good in its entirety. Of course such a result is more easy to arrive at where the latter and void provision is contained in a codicil, which, being held void for affirmative disposition, is, in the absence of a clause of revocation, also void and ineffective to nullify the provisions of the original will, than in a case where, all the provisions being contained in one paper, there would be a natural *prima facie* presumption that the earlier provision was intended to be wiped out any way, leaving only the latter, which was to take its fate of standing or falling on its own merits. But that even in the latter case, where that intent is rebutted by the face of the will, the same result might follow as in the former, the opinion in the case last cited seems to assume. And so it seems to have been held in *Churchill* v. *Churchill*, L. R. 5 Eq. Cas. 44,

cited with approval in *Austin* v. *Oakes*, 117 N. Y. 577 (599). In *McMahon* v. *Allen*, 4 E. D. Smith, 519 (552), it was held that the statute revoking the will of an unmarried woman upon her subsequent marriage, would not deprive such a will of its validity as a testamentary instrument in execution of a power. Compare Farwell on Powers (2d ed.), 215; Real Prop. L., § 145. "A will [in execution of a power] is revoked by a subsequent defective execution of the power, if the defect be such as equity can aid [see *ante*, § 666]; but it will not be revoked by an absolutely invalid appointment." Farwell on Powers (2d ed.), 216.

In the first edition of Farwell on Powers, it was stated that appointments made by will in execution of powers are not revoked by mere general words of revocation of all former wills, without a new appointment; but subsequently the cases on which that rule rested were reversed, and the present edition (p. 213) states the rule in England to be that "a general clause in a will, revoking all former wills, revokes a prior testamentary appointment," citing *Sotheran* v. *Denning*, 20 Ch. D. 99. Also *In re Kingdon*, 32 Ch. D. 604.

"A power of revocation and new appointment is not exercised by general words of appointment, if there is any other power to which the general words may refer." Farwell on Powers (2d ed.), 214. But see *ante*, § 664 *et seq.*, and § 647 *et seq.*

CHAPTER XXIV.

TERMINATION AND EXTINCTION OF POWERS.

(1) *Termination.*

§ 689. When purpose ceases.—Under the Revised Statutes, the article relating to Powers provided (1 R. S. 734, § 102) that 1 R. S. 730, § 67, as amended L. 1875, ch. 545, relating to express trusts (quoted *ante*, § 524), should apply equally to powers in trust. The section thus incorporated now appears, with certain changes, as two sections (Real Est. L., §§ 89, 90), the first of which provides that "when the purpose for which an express trust is created, ceases, the estate of the trustee shall also cease." The second (§ 90) provides for the cessation of an estate or interest in real property vested in trust for creditors, at the expiration of twenty-five years, unless a different limitation is prescribed by the trust instrument or by law. But the present Article relating to Powers omits any provision incorporating these sections or rendering them applicable to powers. The principle, however, that powers are absolutely extinguished when all the purposes for which they were created cease to exist, did not depend upon the statute. Farwell on Powers (2d ed.), 32; *Wheate* v. *Hall*, 17 Ves. 80. When a power is created for a specific purpose, which fails, or is accomplished, the power is extinguished. *Sweeney* v. *Warren*, 127 N. Y. 426 (431); *Benedict* v. *Webb*, 98 N. Y. 460 (463, 467); *Gourley* v. *Campbell*, 66 N. Y. 169; *Fisher* v. *Banta*, 66 N. Y. 468; *Hetzel* v. *Barber*, 69 N. Y. 1 (13); *McCarty* v. *Terry*, 7 Lans. 236; *Bellinger* v. *Shafer*, 2 Sandf. Ch. 293 (295); *Purdy* v. *Wright*, 44 Hun, 239 (241); *Herriott* v. *Prime*, 87 Hun, 95. But if a power is to be exercised not only for the benefit of a third party, but also for the benefit of the donee of the power, it does not fail with the death of the third party. *Cotton* v. *Burkelman*, 142 N. Y. 160. If a power to

sell, mortgage, or lease be given for the purpose of satisfying a charge on the land, and if some other provision for that purpose be accepted in lieu thereof, the trust power is thereby extinguished. *Thompson* v. *Carmichael's Ex'rs*, 1 Sandf. Ch. 387 (397). A power may be several in respect to each of several trust shares, and terminate with the trust as to each, or general, embracing the entire estate, and so continuing as long as any trust lasts. *Bruner* v. *Meigs*, 64 N. Y. 506 (517); *Harvey* v. *Brisbin*, 50 Hun, 376 (380); aff'd 143 N. Y. 151; *Cussack* v. *Tweedy*, 126 N. Y. 81. Thus, where land is devised in trust for four beneficiaries, for their respective lives as to one quarter each, with a remainder over as to the respective quarters, on the death of each, and the executors, to whom the land is devised in trust, are given a general power to sell, and in the meantime to collect and receive the rents, this power may, if such is the intent, validly continue after one or more of the beneficiaries has died, and until the death of the last one and the consequent final termination of the trust. The trustees, on the death of a given beneficiary, become tenants in common with the remainderman in whom his share then vests, and retain the power to sell any or *all* the land, and in the meantime to receive the rents of all. (As the power in such a case continues because it is unlimited, and overrides the whole estate, and exists as a means of dealing advantageously with the portions at any given time held in trust, this would appear to be an instance where the holders of the vested share could not cut off the power by conveying.) *Cussack* v. *Tweedy*, 126 N. Y. 81.

A power given in furtherance of a void trust, and inseparably connected therewith, fails *ab initio*, with the trust, *Benedict* v. *Webb*, 98 N. Y. 460, but nevertheless a separate and distinct power given to the trustees in their capacity as executors, may be valid, and may stand, *McCready* v. *Metropolitan Life Ins. Co.*, 83 Hun, 526, aff'd 148 N. Y. 761. See *post*, § 744.

(2) *Extinction.*

§ 690. **By act of beneficiary.**—It appears that when a trust is created in land, to manage, and to receive and apply rents to A, and in the discretion of the trustee to apply the corpus, and even to convey the entire corpus at any time to A, and so "relieve

himself from the trust," A, the beneficiary, may convey all her interest to the trustee. It seems to be so held in *Matter of City of Rochester*, 110 N. Y. 159. It will be noticed here that the "trust" to apply corpus, and to convey, is in fact not valid as a trust, in real property, but is valid as a power in trust, and that the trustee could at any time convey to A absolutely. That is, the idea of terminating the trust and leaving A with full power of disposition, was not hostile to the scheme of the trust power. Such would seem to be the basis of the remarks of the court. The beneficiary A, who had conveyed to the trustee, was not a party, and this point was not apparently presented or contested, but the title of the trustee to the property thus conveyed was in issue. Compare *ante*, § 496 *et seq.*

§ 691. Election to retain—Immediate interest.—The decisions bearing on the right, under certain circumstances, of those who are interested in property affected by a power, to dispense with its exercise, fall within two main classes : (*a*) Where there is an election to *retain* the property in its present form, unconverted by any exercise of the power, or (*b*) where there is an election to transfer the property in question to a third party, thus extinguishing the power by parting with any interest in its exercise. In both cases the election is in reality the same, *i.e.*, to dispense with the exercise of the power.

"It is a principle now well settled that where by a will money is directed to be laid out in the purchase of land, for designated beneficiaries, or land is directed to be sold and the proceeds distributed, it is competent for the parties beneficially interested, provided they are competent and of full age, and the gift is immediate and not in trust, to elect before the conversion has actually taken place, to take the money in the one case and the land in the other, and when they have so elected and the election has been made known, the power of the trustee for conversion ceases and becomes extinguished, and he cannot thereafter lawfully proceed to execute the power. This doctrine is founded upon the presumption that such a power is given by the testator for the benefit and convenience of the devisees and legatees, and unless made so in terms, was not intended to be imperative so as to prevent the beneficiaries from taking his bounty, except in the precise form

in which the property would exist after the conversion. The doctrine referred to has been considered and applied by this court in several cases. (*Hetzel* v. *Barber*, 69 N. Y. 1; *Prentice* v. *Janssen*, 79 N. Y. 478.) [*Roberts* v. *Cary*, 84 Hun, 328, 334.] Jarman says (1 Jar. 599) that the expressions or acts declaratory of an intention to make an election, though it is said they may be slight, 'must be unequivocal,' and in *Prentice* v. *Janssen*, *supra*, the rule stated in Leigh and Dalzell on Equitable Conversions, 'that a slight expression of intention will be considered sufficient,' is quoted with approval." *Mellen* v. *Mellen*, 139 N. Y. 210 (220); *Parker* v. *Linden*, 113 N. Y. 28 (38); *Seeley* v. *Jago*, 1 P. Wms. 389; *Prentice* v. *Janssen*, 79 N. Y. 478; *Matter of McCaffrey*, 50 Hun, 371 (374); *Purdy* v. *Wright*, 44 Hun, 239 (240–241); *McDonald* v. *O'Hara*, 144 N. Y. 566. Notice to the trustee, of the election, was held sufficient, in *Smith* v. *Farmer Typefounding Co.*, 17 Misc. 311, aff'd N. Y. Law J., Dec. 2, 1896, p. 1. In order to effect this result, those who elect must be entitled to receive the resulting property at once upon the exercise of the power. Thus, if land were to be sold, and the proceeds held in trust for them, they could not elect to retain the land. *Hetzel* v. *Barber*, 69 N. Y. 1. (But see *Harper* v. *Chatham Nat. Bank*, *infra*.) But it is not necessary that they should be devisees of the legal title, in order to exercise the right of election to retain. *Armstrong* v. *McKelvey*, 104 N. Y. 179; *Harper* v. *Chatham Nat. Bank*, 17 Misc. 221. Compare *Hetzel* v. *Barber*, 69 N. Y. 1. Nor that their interest should be an absolute one, as, for example, where there was a direction to sell land, vested in B, for B's benefit, and if B should die without descendants, then over. This would not prevent an election by B to take the land as such, under her fee, subject to being divested. *Matter of McCaffrey*, 50 Hun, 371 (374). *Potter* v. *Dudeney*, 56 Law Times R., 395. Legatees of proceeds of land directed to be sold, may elect to take the land itself. It may be that upon such election the bare legal title still remains in the heirs, who could at any time be compelled to make a formal transfer. But nevertheless, by force of the election, the land is "effectually devised," so as to render devisees liable to creditors of testator (Code C. P., § 1843). *Armstrong* v. *McKelvey*, 104 N. Y. 179.

§ 692. Election to retain—Postponed interest.—In *Harper* v. *Chatham Nat. Bank*, 17 Misc. 221, there was a life estate, and an imperative power in the executors to sell at the end thereof and distribute the proceeds to designated beneficiaries who, pending the life estate, were not vested with the legal title in remainder. It was held that a mortgage executed by these persons in whom the beneficial interest in the proceeds vested at testator's death, though the mortgage was executed pending the life estate, constituted an election to dispense with the power and retain the land. Beekman, J., says: "At the time the mortgages by William D. Harper and Ellen J. Haight were made, a formal instrument was executed by them, directed to the executors, stating that they did not desire the power of sale to be exercised, but that they elected to take the real estate itself instead of its proceeds. In the mortgages which they gave a similar declaration was inserted, a painstaking effort being thus made to indicate, beyond the peradventure of doubt, that they had a settled purpose and intent to take the real estate itself instead of its proceeds. It is claimed that they had no right to make this election before the termination of the life estate, on the ground that such an election can only be made when the conversion in law has taken place. I do not concur in this view. I can perceive no reason why the election should not be exercised in advance of the period for the sale, inasmuch as it in no way operates prejudicially to the rights or interests of any other persons. The same question underwent examination in the case of *Meek* v. *Devenish*, 47 L. J. Rep., N. S., Equity, 57. It was there said by Malins, V. C.: 'The other point which I have to decide here (and it is one upon which I have not had the slightest doubt from the moment the case was opened) is, whether a person who is entitled absolutely in a contingent event may not, before the happening of the contingency, bind the trustees and say to them, "If the contingent event happens before my death, I will elect to have this property kept in specie." I have no doubt, whatever, that if property is given to trustees upon trust to sell and pay the proceeds to A, if one event happens, and to B, if another event happens, B has as much right, before the event happens, to say, "If I become entitled to this property, I will not have it sold," as he would have to say, if the event happened in his favor, "I

will not have it sold." . . . I believe the law to be thoroughly settled that when a man is entitled to property in a contingent event, he may devise it, he may dispose of it, he may make it the subject of mortgage, or sell it, or make it the subject of election or anything else. All he must do is to take care that nothing is done to interfere with the interests of third parties ; but if notice is given while his interest is contingent, it is just as binding when the contingency happens as if it were given afterward.'

"I find no difficulty in applying this common-sense doctrine, thus tersely and vigorously expressed, to the case before me, and I am, therefore, of the opinion that the election to take the property instead of the proceeds was efficiently and completely exercised by the two beneficiaries when these mortgages were made." But compare *Hetzel* v. *Barber*, 69 N. Y. 1, and *post*, § 693.

A contrary view was adopted in *Lydon* v. *Met. El. R. Co.*, 7 Misc. 25 (29), where the right of the plaintiffs, under the direction to sell at the end of the life estate and distribute the proceeds to the members of a certain class then living, were contingent upon their outliving the life tenant. But in that action, brought to enjoin the maintenance of an elevated road in front of the premises, the legal title to the remainder was vested in others subject to the future execution of the power to be exercised for the benefit of the class to which plaintiffs belonged. They would appear to have been the only persons representing the beneficial interest in the remainder, at the time when suit was brought.

§ 693. **Election to convey—Immediate interest.**—It appears that where the title is vested, subject to a power of sale, in the same persons immediately entitled, in case of the exercise of the power, to the proceeds of sale, they may, if otherwise competent (*post*, § 696), elect to convey, free from the power. *Potter* v. *Dudeney*, 56 Law Times R., 395 ; *post*, § 694.

§ 694. **Election to convey—Postponed interest.**—Where the exercise of the power is not postponed by the terms of its creation, those vested with the beneficial title, subject to the power to be exercised for their benefit, may convey the land, and extinguish the power, and this in spite of the fact that the instrument contemplates that upon a sale under the power the proceeds

are to be held in trust. Thus in *Hetzel* v. *Barber*, 69 N. Y. 1, where the title vested in A and B and a power was given to C to sell, and upon a sale the proceeds were to be held in trust for A and B, it was held (*a*) that they could not elect to *retain*, because they were not entitled to receive the proceeds immediately upon sale under the power, but that (*b*) they could elect to *convey* to a third person and thus extinguish both the power and the expectant trust. The distinction seems to be that, as regards an election to retain, the donor's intention must be and could be carried out, and that that intent was that they were not to retain the land ; while as to an election to convey, whatever may have been the donor's intention, the fact is that the devisees were vested with a complete legal title, subject to the power, which *per se* allowed them to convey, and also, that in case of such a conveyance, the devisees would lose all interest in the execution of the power. There would be no one left to compel its execution, or to claim the proceeds of a sale under it, and therefore it must at once fall with the extinction of its purpose. Compare *Armstrong* v. *McKelvey*, *supra*. In *Steves* v. *Weaver*, 49 Hun, 267, a life estate was given to A, and A and B were appointed executors with power to sell such portions as A should designate, for her use. A alone, as executrix, conveyed certain portions, and this action was brought by the purchaser to compel B to join in the conveyance. It was held that it was necessary for both to unite in order to convey under the power, and that A alone could convey nothing. The point of election was not raised. Further, A had undertaken to convey not by way of election, but under the power.

§ 695. **Postponed power—Election to accelerate.**—Where by a will the exercise of a power of sale given to executors is postponed for the benefit of devisees or legatees during the intermediate period, it is held that the execution of the power may be accelerated *by the consent of the executors and all the persons interested*, provided the persons who are interested, and who join in the conveyance, are *sui juris*, and the conveyance is not in contravention of any trust, and is consistent with the substantial purposes of the testator in creating the power. *Kilpatrick* v. *Barron*, 125 N. Y. 751 ; *Hetzel* v. *Barber*, 69 N. Y. 1. (Con-

cerning the necessity for a joinder of the grantee of the power; and for requiring that the parties should be *sui juris*, see *post*, §§ 695, 696.)

§ 696. **Who may elect.**—All who are entitled must join in order to render an election effective. *McDonald* v. *O'Hara*, 144 N. Y. 566; *Morse* v. *Morse*, 85 N. Y. 53 (61); *Mellen* v. *Mellen*, 139 N. Y. 210 (221–222); *Emens* v. *St. John*, 79 Hun, 99; *Steves* v. *Weaver*, 49 Hun, 267; *Taber* v. *Willets*, 1 App. Div. 285 (288). There seems to be some doubt, under the authorities, how far the infancy of one of the parties would incapacitate him from joining in an election, with the result of rendering any election by the other parties also impossible. As to whether an infant might elect, by his guardian, appears to be an open question. *McDonald* v. *O'Hara*, 144 N. Y. 566 (569), though several cases appear to assume that all must be *sui juris*. *Kilpatrick* v. *Barron*, 125 N. Y. 751; *Armstrong* v. *McKelvey*, 39 Hun, 213 (216), aff'd 104 N. Y. 179; *Mellen* v. *Mellen*, 139 N. Y. 210 (220).

§ 697. **Election—How effected.**—Where those interested in the execution of the power are heirs or devisees, and may elect to convey, their conveyance furnishes of course clear evidence of their election. If the election is to retain the property in its present form, evidence must be sought elsewhere. They might bring suit to enjoin the donee from exercising his power. *Mellen* v. *Mellen*, 139 N. Y. 210 (221). Mere possession, occupancy and control do not evidence an election, nor does an appropriation of the rents and profits. *Id.* The commencement of an action in partition would probably suffice, if all desired it. *Id*; *ante*, § 557. A long lapse of time during which the power remained unexecuted though there was no obstacle to its execution, might alone, or with other circumstances, affect the presumption of an election. *Id.*, p. 222. But a delay of two or three years has been held insufficient to effect that result. *Id.*, and cases cited. Expressions or acts declaratory of an intention to make an election "may be slight" but "must be unequivocal." *Id.*, p. 220. The election may be evidenced by a clause in a judgment, inserted by the parties interested, under which they take possession, *Armstrong* v.

McKelvey, 104 N. Y. 179 (183), even though the clause does not represent a necessary adjudication of anything in issue in the action, s. c. 39 Hun, 213 (216), see also *Harper* v. *Chatham Nat. Bank*, 17 Misc. 221, *ante*, § 692 ; *Potter* v. *Dudeney*, 56 Law Times R., 395 ; *Roberts* v. *Gordon*, 6 Ch. D. 531 ; *Crabtree* v. *Bramble*, 3 Atk. 680 ; or by an explicit notice served on the trustee, *Smith* v. *Farmer Typefounding Co.*, N. Y. Law J., Dec. 2, 1896, p. 1.

§ 698. **Agreement not to execute.**—All beneficial powers, as defined by our law, would fall within the scope of the English rule by which a covenant or agreement by the donee not to exercise the power operates as a release of it ; and this may be so though the covenant is merely voluntary. Farwell on Powers (2d ed.), 16–17. No New York authorities have been found on this point, but the principle appears to be consistent with our system, subject to the rights of creditors of the beneficial donee (see *post* Chap. XXV.).

§ 699. **By merger—By revocation.**—Upon the subject of merger, see *ante*, § 561 *et seq.* Upon the subject of the termination of a power by the exercise of a valid power to revoke it, see *ante*, Chap. XXIII.

PART III.

CHAPTER XXV.

THIRD PARTIES.

(1) *Creditors.*

§ 700. **Creditors of creator of trust.**[1]—Assuming that a trust is duly created in other respects, and as to all other persons, it may still be invalid as against the creditors of the creator of the trust, and subject to their attack. This may happen in either of two cases: first, where the transfer, whether absolute and regular on its face, or not, is actually fraudulent as against creditors; Real Prop. L., § 227; 2 R. S. 137, § 1. Bishop on Insolvent Debtors (3d ed.), Chap. XIII. and XIV. (see also *post*, § 701; and § 717); and second, where the law, irrespective of actual fraud, holds the transfer void as to creditors, on the ground that in reality it leaves the property, in effect and substance, still the property of the debtor. Such are transfers of goods, chattels and things in action made in trust for the use of the person creating the same. 2 R. S. 135, § 1; see Code C. P., § 1871; transfers of real property reserving to the grantor for his own benefit an absolute power of revocation, Real Prop. L., § 125; and general assignments defective merely through failure to comply with some purely formal statutory requirements. Bishop on Insolvent Debtors (3d ed.), § 197. See Real Prop. L., § 229. So also

[1] In this chapter, the topics relating to the creditors of a trust beneficiary, and to the beneficiary's wife and children, are examined in detail. The treatment of the other topics, relating to creditors of the creator of a trust or power, of the trustee and donee, and of the owner subject to a power; to purchasers and encumbrancers, and to widows entitled to dower, is, for the reason that they belong more properly within subjects other than that of this book, confined chiefly to a reference to the controlling statutes and the leading principles.

where a trust is created by will, the property of the testator, including that left in trust, is by law rendered subject, in the statutory order of succession, to the payment of testator's debts.

As to the creditor's remedy by attachment, or levy, where a debtor assigns his property to a trustee, for the purpose of defrauding his creditors, see *McAllaster* v. *Bailey*, 127 N. Y. 583 ; *Anthony* v. *Wood*, 96 N. Y. 180 ; *Thurber* v. *Blanck*, 50 N. Y. 80 ; *Castle* v. *Lewis*, 78 N. Y. 131 (136) ; *Hess* v. *Hess*, 117 N. Y. 306 ; Bishop on Insolvent Debtors (3d ed.), pp. 319–320, p. 309, p. 324.

If the trust created is valid, and is such as to vest the fee in the trustee, pending the trust, the grantor's interest in a possible future surplus, if any, which may hereafter prove to exist, or his right to satisfy the trust from other property and thereby extinguish the trust, in no sense diminishes the trustee's title, and there is no title or interest in the grantor to which the lien of a judgment could attach. *People ex rel. Short* v. *Bacon*, 99 N. Y. 275 (279).

Conveyances, etc., void as against creditors, etc., under Real Prop. L., Art. VII., are " equally void as against their heirs, successors, personal representatives, or assigns," Real Prop. L., § 228 ; and as to personal property, see 2 R. S. 137, § 3.[1]

§ 701. **Creditors of creator of power.**[2]—If instead of creating a trust, the owner of property creates a power over his property, he does so either by conferring it upon another, or by transferring the property and reserving a power to himself. In either case, it may be held for his benefit, or for the benefit of others. If he reserves a special and beneficial power, it is liable to the claims of his creditors in the same manner as other interests that cannot be reached by execution ; and the execution of the power may be decreed for the benefit of the creditors entitled. Real Prop. L., §§ 139, 124. As to an absolute power, see *Id.*, §§ 124, 125. A beneficial power passes to a trustee or committee of the estate of the person in whom the power is vested, or an assignee

[1] As to cases where the creator of the trust is also the beneficiary, see *post*, § 710.

[2] See § 700, note.

for the benefit of creditors. *Id.*, § 144. A power reserved by a grantor is subject to the provisions of the article on Powers, in the same manner as if granted to another. *Id.*, § 124. "Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned. *Id.*, § 125. "A power is a lien or charge on the real property which it embraces [and therefore falls within the prohibition of Real Prop. L., § 227, relating to "charges" made with the intent to hinder, delay and defraud creditors] as against creditors, purchasers and encumbrancers in good faith and without notice, of or from a person having an estate in the property, only from the time the instrument containing the power is duly recorded. As against all other persons, the power is a lien from the time the instrument in which it is contained takes effect." Real Prop. L., § 127. But it ceases to be a charge when, its purpose having ceased, the power also ceases. *Prentice* v. *Janssen*, 79 N. Y. 478. Powers created by will cannot of course affect the ultimate liability of testator's estate for his debts.

§ 702. **Creditors of the trustee.**[1]—"Where an express trust is created, but is not contained or declared in the conveyance to the trustee, the conveyance shall be deemed absolute as to the subsequent creditors of the trustee not having notice of the trust. . . ." Real Prop L., § 84.

Under ordinary circumstances, a person with whom a trustee makes an executory contract for services relating to the trust estate, becomes, upon performance, a creditor not of the estate, or of the trustee as such, but of the trustee individually. He acquires no lien upon the trust property, and no right to a judgment and execution which shall subject that property to payment of his claim. *Mander* v. *Low*, 12 Misc. 316. This principle and its qualifications are discussed more fully *ante*, §§ 177, 178. *Bingham* v. *Marine Nat. Bank*, 41 Hun, 377, aff'd 112 N. Y. 661; *Delaware, L. & W. R. R. Co.* v. *Gilbert*, 44 Hun, 201, aff'd 112 N. Y. 673; *U. S. Trust Co.* v. *Roche*, 116 N. Y. 120.

[1] See § 700, note.

§ 703. **Creditors of donee of power.**[1]—The power may be beneficial, in which case it falls within § 711, *post.* If it is in trust, and valid, so as to permit of enforcement by designated beneficiaries, the creditors of the donee would have no interest in it.

§ 704. **Creditors of beneficiary of trust.**—As already noticed, the beneficiary of the trust, and the creator of it, may, or may not, be the same person. This feature plays a part in the determination of the rights of the creditors of the beneficiary to reach his beneficial interest. In the cases now to be considered, these two classes of trusts are described as those created by a third person, and those created by the beneficiary.

§ 705. **(a) Under trusts created by third person.**[2]—Where a beneficiary under an express trust is a debtor, the right of his creditors to reach the trust fund, or the income, is regulated by two statutory provisions. The first is as follows: "Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which cannot be reached by execution." Real Prop. L., § 78 (formerly 1 R. S. 729, § 57). Compare §§ 477, 489, 490, *ante.* The second provision referred to, occurs in the article in the Code relating to judgment creditors, and is as follows: "Where an execution, against the property of a judgment debtor, issued out of a court of record, . . . has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action against the judgment debtor, and any other person, to compel the discovery of . . . any money, thing in action, or other property . . . held in trust for him" (the judgment debtor); "to prevent the transfer thereof, or the payment or delivery thereof, to him, or to any other person," etc. Code C. P., § 1871.

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[1] See § 700, note.

[2] See several valuable notes, citing many authorities on the rights and remedies of creditors of a beneficiary, in Ames's "Cases on Trusts," p. 445 *et seq.*

"This article does not . . . authorize the discovery or seizure of, or other interference with, any . . . money, thing in action, or other property held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor." Code, § 1879. The Code provision allows satisfaction out of personal property held in trust for the debtor, excepting that it has no application, either to permit or forbid, where the trust has been created by, or the trust fund has proceeded from, a third party. But the special provision of the Revised Statutes (now Real Prop. L., § 78) does apply, and gives the right to have surplus rent and income applied to the payment of debts. The two are, therefore, in no sense inconsistent. *Williams* v. *Thorn*, 70 N. Y. 270, and numerous authorities there cited. Sec. 83 of the Real Property Law, prohibiting the assignment or other disposition, by a person beneficially interested in certain trusts, of such interest, must be read in connection with Real Prop. L., § 78. This section applies indiscriminately to trusts of real and of personal property. *Williams* v. *Thorn*, 70 N. Y. 270 (273) and cases cited; *Wetmore* v. *Truslow*, 51 N. Y. 338; *Tolles* v. *Wood*, 99 N. Y. 616; *Hallett* v. *Thompson*, 5 Pai. Ch. 583. An historical review of the earlier law as bearing on the statutory provisions above cited, may be found in *Craig* v. *Hone*, 2 Edw. Ch. 554 (558, 566).

The creditor is confined to the surplus rents or income, but not to those already accumulated in the hands of the trustees. The decree may fix the sum necessary for support and direct the retention of the surplus of future instalments. *Williams* v. *Thorn*, 70 N. Y. 270 (278) and authorities cited; *Wetmore* v. *Wetmore*, 149 N. Y. 520. But it is only the surplus that can be thus applied. This surplus is computed by determining and reserving what is needed not only for the beneficiary, but for his wife and children. *Bunnell* v. *Gardner*, 4 App. Div. 321; *Andrews* v. *Whitney*, 82 Hun, 117; *Tolles* v. *Wood*, 99 N. Y. 616; and cases cited, *post*, § 713 *et seq.* But it is not necessary in bringing suit, to allege or prove that there is an accrued surplus now in the trustee's hands; it is only necessary to allege and prove that the rents or income provided exceed the requirements of the debtor, *Howard* v. *Leonard*, 3 App. Div. 277; the burden of

proving this much rests on the creditor. *Bunnell* v. *Gardner*, 4 App. Div. 321 ; *Kilroy* v. *Wood*, 42 Hun, 636. And the fact that the trustees are directed to "apply" income, instead of to "pay" it, to the beneficiary does not vary the foregoing principles. *McEvoy* v. *Appleby*, 27 Hun, 44.

Even such rights as the beneficiary's creditor has, under the foregoing principles, relate, of course, only to rents or income which the beneficiary is entitled to under the terms of the trust ; and not to rents or income either given to others, or undisposed of, by the trust instrument. For rents thus undisposed of belong not to the beneficiary of the trust as such, but either to those entitled under the principles of the common law (*ante*, § 556), or, in certain cases, to the persons presumptively entitled to the next eventual estate (*ante*, § 489). This general proposition might seem too obvious to call for statement, but for the fact that in practice certain cases appear, at least at first sight, to run close to the boundary line between the two classes. Thus, if a trustee be directed to apply all the rents to the use of A, and he needs only half of them for current support, the other half constitutes a surplus which may be subjected to the claims of his creditors ; while if the trustee be directed to apply to the use of A such part of the rents as may be required for his maintenance, and he only requires one half thereof, the other half cannot be thus reached ; in the former case, all the income is his, whether he needs it or not ; in the latter case, what he does not need belongs to some one else. See *ante*, §§ 490, 477, 478, 479, 480.

The creditors of a beneficiary cannot reach the corpus of a fund held under a valid trust, created by another person, to receive and apply income. *Kennedy* v. *Hoy*, 105 N. Y. 134. As to a trust of personalty to pay over the principal to the beneficiary from time to time in small sums, see *Havens* v. *Healy*, 15 Barb. R. 296. A given creditor acquires a lien upon the accrued and unexpended surplus income, or that subsequently arising from the fund, superior to the claims of general creditors or assignees of the beneficiary, by the commencement of an action in equity to reach and appropriate it to the satisfaction of his judgment. *Tolles* v. *Wood*, 99 N. Y. 616. As to creditors' rights in accrued income, compare a note in 10 Harv. L. Rev.

193. For the facts considered by the court in determining the existence of a surplus, see *Kilroy* v. *Wood*, 42 Hun, 636 ; *Card* v. *Meincke*, 72 Hun, 299 ; *Sillick* v. *Mason*, 2 Barb. Ch. 79 ; *Genet* v. *Beekman*, 45 Barb. R. 382 ; *Wetmore* v. *Wetmore*, 149 N. Y. 520 (531). *Post*, end of § 716. A trustee cannot apply the trust fund to the payment of a debt of the beneficiary to himself. *Terry* v. *Bale*, 1 Dem, 452. A married woman's interest in a trust to receive and apply rents to her use, is not her "separate property" in the sense in which that term is used in the law affecting married women. *Noyes* v. *Blakeman*, 6 N. Y. 567 (581) ; *Albany F. I. Co.* v. *Bay*, 4 N. Y. 9 (19) ; *Rogers* v. *Ludlow*, 3 Sandf. Ch. 104 (108). Where the beneficiary under a trust to receive and apply rents is permitted to occupy the land itself, crops raised by him there are not exempt as part of the trust property. *Salsbury* v. *Parsons*, 36 Hun, 12.

§ 706. **Assignable interests.**[1]—If the instrument in question does not create an express trust rendering the interests of the beneficiary inalienable, the foregoing principles do not apply, and his entire interest is subject to the claims of creditors. *Hallett* v. *Thompson*, 5 Pai. Ch. 583 ; *Clute* v. *Bool*, 8 Pai. Ch. 83, 86 (and reporter's note, Banks' Ed.) ; *Degraw* v. *Clason*, 11 Pai. Ch. 136 ; compare *Curtis* v. *Engel*, 2 Sandf. Ch. 287 (292–293). See Real Prop. L., § 142, quoted *post*, § 711.

In *Hallett* v. *Thompson*, *supra*, the will contained the following provision : "I give and bequeath unto my friend Jeremiah Thompson, of the City of New York, the sum of $4000 ; which sum I nevertheless order my executors to retain in their hands and put at interest ; and pay the interest thereof yearly to the said Jeremiah, during his natural life, unless the said Jeremiah shall, during his life, by an instrument in writing, under his hand and seal, require the payment of the said legacy to himself ; and in that case I order my executors to pay it over to the said Jeremiah with all interest due thereon. But in the event of the death of the said Jeremiah without receiving said legacy as aforesaid, I then order the same to be paid and applied by my executors as the said Jeremiah shall by his last will and testament

[1] See *ante*, Chap. IX.

direct ; or if he die without a will, then my executors are directed to pay the same to his heirs at law ; hereby declaring that neither the aforesaid legacy to the said Jeremiah Thompson, or any interest thereof, shall in any case be liable to any of his creditors, for the payment of any debt owing by him." The court said : " It is very obvious from the terms in which the bequest was made, that the object of the testatrix was not to secure to the legatee a support and maintenance out of the interest, or income, of a trust fund, which should be inalienable by the *cestui que trust*, in analogy to the provision before referred to in relation to a similar trust to receive the rents of real estate for the same object. On the contrary, it was an attempt to give to the legatee an absolute and uncontrollable interest in personal estate, and at the same time to prevent its being subject to the usual incidents of such an absolute right to property, so far as the rights of creditors are concerned. This cannot be done consistently with public policy, or the settled rules of law. If such a principle was once sanctioned by this court, it would be only necessary for a testator to direct his executors to turn his real estate into money and hold the same subject to the control of the legatee, to defeat entirely the benefit which was intended to be secured to creditors, by the 57th section of the statute before referred to [now Real Prop. L., § 78], out of the surplus income of the estate."

Under this principle it would appear that a grave question is raised, whether L. 1893, ch. 452, Real Prop. L., § 83, authorizing a beneficiary, who is also entitled to the remainder, to release his trust interest, effect a merger of the trust estate in the remainder, and acquire an absolute estate, does not render his interest, even before such merger, liable to the claims of creditors. Compare the several provisions relating to powers, under which a beneficial power to dispose of property, operates for the benefit of creditors. Real Prop. L., §§ 124, 125, 129–133, 144. The revisers of 1830, speaking of this subject, say : " In reason and good sense, there is no distinction between the absolute power of disposition and the absolute ownership ; and to make such a distinction, to the injury of creditors, may be very consistent with technical rules, but is a flagrant breach of the plainest maxims of equity and justice. There is a moral obligation on every man, to

apply his property to the payment of his debts ; and the law becomes an engine of fraud, when it permits this obligation to be evaded by a verbal distinction. It is an affront to common sense to say, that a man has no property in that which he may sell when he chooses, and dispose of the proceeds at his pleasure. We apprehend the Legislature will have no difficulty in declaring, that so far as creditors and purchasers are concerned, the power of disposition shall be deemed equivalent to the actual ownership." And further, the new provision, Real Prop. L., § 83, is clear evidence of the fact that the public policy of the State no longer requires the maintenance of trusts to receive and apply income against all assault. If the beneficiary once acquires the remainder, public policy is in nowise infringed if he chooses to wipe out the trust.

A beneficiary may, it is said, assign accrued income, but the creditor can only reach surplus, whether accrued or future. *Tolles* v. *Wood*, 99 N. Y. 616 ; *Matter of Valentine*, 5 Misc. 479. As to this, see a note in 10 Harv. L. Rev. 193.

§ 707. **Void trust—Beneficiary as heir.**—If the trust is void, and the beneficiary is heir, next of kin, or residuary legatee or devisee, the property may be, on the facts of a given case, his absolutely, and so subject to the claims of his creditors. But if, in a suit to which the beneficiary is a party, it is determined that the trust is valid, this decree, binding on the beneficiary, is also binding on his judgment creditors, and estops them from relitigating the same question in order to set aside the trust and reach the fund as the absolute property of the beneficiary. *Pray* v. *Hegeman*, 98 N. Y. 351 (362).

§ 708. **Execution returned.**—While in suit on a creditor's bill, the failure to procure judgment and have execution issued and returned before bringing suit in equity, is not excused by the fact that such steps would have been futile, it is excused if the situation is such as to render impossible the aid of a court of law to take the preliminary steps, and produce what ordinarily may be treated as the condition precedent to the application for equitable relief. *N. T. Bank* v. *Wetmore*, 124 N. Y. 241 (248–249). A provision in a trust instrument that the interest of the

beneficiary shall cease upon the recovery of a judgment against him in a creditor's suit instituted for the purpose of obtaining satisfaction from the fund is valid. *Bramhall* v. *Ferris*, 14 N. Y. 41 (44, 45), and cases there cited.

§ 709. Supplementary proceedings.—The surplus not needed for the debtor's support cannot be ascertained in supplementary proceedings, and a receiver appointed in such proceedings cannot maintain a suit to reach so much of the income as is not thus required, *Campbell* v. *Foster*, 35 N. Y. 361, at any rate not until it has actually accrued and become payable, and perhaps not until it has been in some way determined that there will be a surplus, *Graff* v. *Bonnett*, 31 N. Y. 9 ; *Scott* v. *Nevins*, 6 Duer, 672 ; *Locke* v. *Mabbett*, 2 Keyes, 457 ; s. c. 3 Abb. Ct. App. Dec. 68 ; see *Manning* v. *Evans*, 19 Hun, 500 ; *Morgan* v. *Von Kohnstamm*, 9 Daly, 355 ; *Genet* v. *Foster*, 18 How. Pr. 50 ; *Levey* v. *Bull*, 47 Hun. 350 ; and apparently not in any event, except as to surplus accrued at the time of the receiver's appointment, see Code C. P., § 2463, and compare *Continental Trust Co.* v. *Wetmore*, 67 Hun, 9.

§ 710. (b) Under trusts created by beneficiary.—In addition to the general subject of fraudulent conveyances, the Revised Statutes, 2 R. S. 135, § 1, provide that " All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." But they are valid as to other persons. *Rosenburg* v. *Rosenburg*, 40 Hun, 91 ; *Bliss* v. *West*, 58 Hun, 71 (74), aff'd 132 N. Y. 589 ; *Spies* v. *Boyd*, 1 E. D. Smith, 445. For a general discussion of the meaning and scope of this statute, and a review of the principal authorities, see *Knapp* v. *McGowan*, 96 N. Y. 75 ; *Sloan* v. *Birdsall*, 58 Hun, 317. Bishop on Insolvent Debtors, 3d ed., § 206. And by § 1871 *et seq.* of the Code, already considered *ante*, § 705, the interest of a judgment debtor in a trust created by himself for his own use may be reached in equity by judgment creditors. And where for any reason an attempted trust is void, the property is subject to the claims of the creditors of the actual owner.

And where the grantor in any conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned. Real Prop. L., § 125. And the disposition is valid as to other persons. *Rosenburg* v. *Rosenburg*, 40 Hun, 91. A note in 16 Abb. N. C., p. 20, reviews the authorities prior to 1887, and discusses the general subject of the right of creditors to reach property held in trust. In a trust created by one for his own benefit, the personal convenience of the settlor is a sufficient consideration to support the transfer. *Townsend* v. *Allen*, 13 N. Y. Supp. 73, aff'd 126 N. Y. 646. It would seem that, the transaction being *executed*, by the delivery of a deed of trust, reliance might have been placed upon the seal to negative any attack on it for mere absence of consideration. *Ante*, §§ 84, 103.

§ 711. **Creditors of beneficiary of power.**—" A special and beneficial power is liable to the claims of creditors in the same manner as other interests that cannot be reached by execution; and the execution of the power may be decreed for the benefit of the creditors entitled." Real Prop. L., § 139.

" The execution, wholly or partly, of a trust power may be adjudged for the benefit of the creditors or assignees of a person entitled as a beneficiary of the trust, to compel its execution, where his interest is assignable." Real Prop. L., § 142.

" A beneficial power, and the interest of every person entitled to compel the execution of a trust power, shall pass, respectively, to a trustee or committee of the estate of the person in whom the power or interest is vested, or an assignee for the benefit of creditors." Real Prop. L., § 144. Under powers such as, under the operation of the statutes, Real Prop. L., §§ 129–133, effect a fee in the donee, the rights of his creditors attach as there set forth. *Ante*, 561 *et seq.* As to a creditor's right to enforce the execution of a power, see *Rogers* v. *Ludlow*, 3 Sandf. Ch. 104 (108); *Kinnan* v. *Guernsey*, 64 How. Pr. 253; and as to the rights of the creditors of a donee under a power of appointment by will, *Cutting* v. *Cutting*, 86 N. Y. 522. Where a judgment debtor is entitled to receive the proceeds of a sale, under a power, of land not vested in him, this does not authorize the judg-

ment creditor to sell the land under the execution. The debtor's interest is equitable, and could only be enforced by a suit in equity, to the bringing of which the return of an execution unsatisfied is a condition precedent. *Harvey* v. *Brisbin*, 143 N. Y. 151. In case of sale under a power, even if the land is vested in the debtor subject to the power to be exercised for his benefit, the lien of the judgment attaches to the proceeds, and does not follow the land. *Sayles* v. *Best*, 140 N. Y. 368 ; *Ackerman* v. *Gorton*, 67 N. Y. 63. *Post*, § 712.

§ 712. **Creditors of owner subject to power.**[1]—A remainder subject to a life estate, and subject to a power in executors to sell at the end of the life estate, is descendible, devisable and alienable. So with a present estate subject to a power in executors to lease for a given term and at the end thereof to sell. In both cases, the right of the owner who is vested subject to the power, is subject to the lien of a docketed judgment against him. *Sayles* v. *Best*, 140 N. Y. 368 ; *Ackerman* v. *Gorton*, 67 N. Y. 63. But if he is also entitled to proceeds in case of sale, it attaches to the proceeds, and does not follow the land. *Id.* And if one has purchased from the owner, prior to the execution of the power, thereby succeeding to his rights subject to the life estate and power, it follows that on sale under the power, the purchaser from the owner has his rights transferred to the fund. If the executor (donee of the power) accounts, he is not required to cite the judgment creditor of the beneficiary, and, on distributing the proceeds to the grantee of the owner, under direction of the surrogate's decree, becomes freed from liability, and the judgment creditor must look to the recipients of the funds from the executor. There are various steps which the judgment creditor might have taken to enforce his rights while the funds were still in the hands of the executor undistributed. *Sayles* v. *Best*, 140 N. Y. 368 ; *Ackerman* v. *Gorton*, 67 N. Y. 63. Also *ante*, § 711. As to a case where the legal title is held, by way of mere fiction, by a tenant by the curtesy, subject to an impera-

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[1] See *ante*, § 700, note. As to creditors of one who owns land subject to a trust, see *ante*, §§ 139–144 ; 397, pp. 286–288.

tive power of sale for the benefit of others, see *Harvey* v. *Brisbin*, 143 N. Y. 151.

(2) *The Beneficiary's Wife and Children.*

§ 713. **Introductory.**—The subject of the rights of the beneficiary's wife and children in the rents and income of a trust created for his benefit, may best be considered under the following heads: (*a*) Rights of wife and children if named in the trust instrument. (*b*) General rights of wife and children if not named in the trust instrument. (*c*) Rights of wife and children under a decree granting a divorce and directing payment for support.

§ 714. (a) **If wife and children are designated** in the trust instrument as co-beneficiaries, no special difficulty exists. *Matter of Appley*, 33 N. Y. Supp. 724. But where there is a trust to receive and pay rents to A to be applied by A to the maintenance and support of himself and his children, there appears to be a question whether A takes the income charged with a trust, enforceable in favor of the children to the extent necessary for their support and maintenance, though it is said that there are many authorities, which at least give color to this contention. It seems to be a matter of construction, on the question of intent. *Ante*, p. 17. (Compare *Clarke* v. *Leupp*, 88 N. Y. 228.) *Hendricks* v. *Isaacs*, 117 N. Y. 411 (419); *Crandall* v. *Hoysradt*, 1 Sandf. Ch. 40; *Woodward* v. *James*, 115 N. Y. 346 (357). Under a devise and bequest to A, to receive and apply the rents and income to the use of A himself, and his wife, Anna, and their son Robert, it was held that the trustee had a reasonable but not an uncontrolled discretion, in determining the method of application, and the particular share to which each should be entitled; that circumstances, such as the fact that they all lived together, or that the son lived apart in his own house, or that the wife had procured a separation, or that one or the other was sick or infirm, etc., might properly have weight in varying the exercise of his discretion. The court exercised its discretion, under the given facts, in giving the son one third, counting from the bringing of this suit by him, but not for the preceding period during which he had acquiesced in the trustee's course; as to the wife, who had procured a partial divorce, and been awarded

$1000 as alimony, one third was also awarded, from the bringing of this suit, less the $1000 annual alimony, on the ground that in fixing alimony the court had regarded the entire income of the trust as the husband's own, and this fact had formed the basis of the allowance. *Ireland* v. *Ireland*, 84 N. Y. 321.

And where a will gave to testator's wife the use and income of real and personal property for the support of herself and for the support and education of her son, during minority, to remain in her full control for her benefit and that of her son, and in case of her death during his minority, testator's executor to have control for the son's benefit during minority, it was held to create a valid trust as to the son, the wife taking the beneficial use and income also for her support. *Macomber* v. *Bank of Batavia*, 12 Hun, 294. In *Matter of Appley*, 33 N. Y. Supp. 724, under a trust provision for a man and his family, the wife had upon notice to the husband, and A, the trustee, procured an order directing the payment to her by "A, trustee," a specified annual sum from the income. A died, and upon the refusal of his successor to comply with the order, on the ground that it was not directed to him, a new application was made to compel him to continue the payments. The court held that the successor would have been justified in acting under the former order; that the matter had already been passed on and settled by the court, and that accordingly a new order, merely to afford explicit authority to the successor, might be granted upon the pending application, although the service of notice upon the husband, while personal and actual, was not such as would have sufficed to give the court jurisdiction over him on a separate and distinct application.

§ 715. (b) **If wife and children are not designated** in the trust instrument, yet any trust to receive and apply rents to the use of a man, extends also to his wife and children, the rights of whom, under the trust, are superior to those of judgment creditors of the beneficiary named. It is only the surplus income, over and above what is needed for the proper maintenance and support of the wife and children of the beneficiary, as well as of himself, that can be reached by such creditors. *Tolles* v. *Wood*, 99 N. Y. 616; *Williams* v. *Thorn*, 70 N. Y. 270; *Wetmore* v. *Wetmore*, 149 N.Y. 520; *McEvoy* v. *Appleby*, 27 Hun, 44; *Sil-*

lick v. *Mason*, 2 Barb. Ch. 79. But if the wife is the beneficiary, the husband has no interest in the trust, and her judgment creditors may reach the surplus above what is needed for the support of the wife and children only. *Howard* v. *Leonard*, 3 App. Div. 277 ; *Stuart* v. *Kissam*, 2 Barb. R. 493, reversed, but not on this point, 11 Barb. R., 271. (As to whether this principle would be applied where the husband was incapacitated, and dependent on the wife, see the cases just cited.)

§ 716. (c) **If the wife procure a divorce,** and the decree directs the husband to make payments for her support and that of the children, she may by suit in equity compel the husband's trustee to make payments to her out of the income payable to the husband, and whether yet accrued or not, on account of the amount so decreed to her in the divorce suit. *Wetmore* v. *Wetmore*, 149 N. Y. 520 ; *Thompson* v. *Thompson*, 52 Hun, 456. Under this head several questions have been passed on by the courts. And first as to the necessity of any preliminary attempt to reach the defendant's property, before bringing such a suit in equity.

In *Miller* v. *Miller*, 7 Hun, 208, it was held (1) that the wife's right to have the income applied to the payment of her alimony, which was, apparently, a lump sum, rested solely on her position as a creditor of her husband and so entitled to the surplus under 1 R. S. 729, § 57 (Real Prop. L., § 78) ; (2) that therefore execution must be issued upon the judgment awarding alimony, and be returned unsatisfied, before she could proceed in equity. Thereupon execution was issued, and returned unsatisfied, and a new suit was brought in equity, on the theory of a creditor's bill, alleging, and seeking to reach, an existing surplus, *Miller* v. *Miller*, 1 Abb. N. C. 30, and this claim was sustained. But the court says : " These views are based upon the treatment of the plaintiff as an ordinary judgment creditor ; whether that is her just position before the court, is certainly a question which is worthy of consideration," and strongly intimates the opinion that her right is distinct from and superior to that of a judgment creditor, and is based on the duties and incidents of the marital relation, as crystallized in the judgment for alimony. In *Thompson* v. *Thompson*, 52 Hun, 456, after judgment directing the

husband to pay an annual sum for the support of the wife and their child, the wife brought suit in equity against her husband, and the trustee of a trust to receive and apply income to the use of the husband, to secure payment of her alimony from the income. It would appear that no execution had been issued. The court held (1) that the trust for the benefit of the husband extended also to the support of his wife and child, and that a judicial provision for their support out of the income is a proper application of a portion of the income, and paramount to the rights of judgment creditors (this principle being also supported by *Tolles* v. *Wood*, 99 N. Y. 616; *Howard* v. *Leonard*, 3 App. Div. 277; *Williams* v. *Thorn*, 70 N. Y. 270; *McEvoy* v. *Appleby*, 27 Hun, 44; *Sillick* v. *Mason*, 2 Barb. Ch. 79); and (2) that such application may be made, to satisfy a decree in a divorce suit providing for the wife and children. This case evidently proceeds on the theory that the decree does not render the wife a creditor; that she does not proceed under the statute defining creditors' rights in the surplus; that she is not confined to such surplus; and that she need not exhaust her remedy at law before suing in equity. In *Romaine* v. *Chauncey*, 129 N. Y. 566, it was held that a decree granting alimony does not render the wife a creditor of the husband, in the ordinary sense, nor is her claim against him property, in all senses; and that accordingly a prior creditor of the wife cannot compel the appropriation of alimony to the satisfaction of the debt. To the same effect are *Locke* v. *Locke*, 71 Hun, 363; *Andrews* v. *Whitney*, 82 Hun, 117.

The final cases to be considered on the present point are those arising under a trust created for the benefit of William B. Wetmore, under which he was entitled to the income of a fund of $100,000 for his life. His wife procured a divorce, and the decree awarded her $3000 annually, for her own support, and $1000 annually for that of each of their three infant children. The payments being in arrear, the wife first obtained judgment against the husband for the amount then accrued, and execution thereon was issued and returned unsatisfied. (See 149 N. Y., p. 525.) Thereupon, the wife obtained an order under Code C. P., § 1772, by which the personal property, and the rents and profits of the real property of the husband, were sequestered, and the Conti-

nental Trust Company was appointed receiver thereof. That receiver then brought an action against the trustee (*Continental Trust Co.* v. *Wetmore*, 67 Hun, 9) to reach the income of the trust fund. And it was held that the receiver could not maintain an action for that purpose, and that the relief sought could only be obtained in a suit brought in the name of the wife. Thereupon such an action was brought (*Wetmore* v. *Wetmore*, 79 Hun, 268). The court at general term held that the action was not in the nature of a creditor's bill; that the wife and children of a beneficiary are included in the personal use to which the income of the trust fund is to be applied. "Their use is his use. Why? Clearly because of his legal obligation to support and maintain them." "As the plaintiff was not treated as an ordinary creditor, there was no question of *surplus* property before the court. There was nothing to be ascertained upon that head." Here the point is that the wife's right of action has nothing to do with the statute allowing a judgment creditor to reach the surplus. Indeed, as that surplus which judgment creditors can reach is the surplus *over and above* what is required for the use of the wife and children as well as the designated beneficiary, *Williams* v. *Thorn*, 70 N. Y. 270; *Tolles* v. *Wood*, 99 N. Y. 616; *McEvoy* v. *Appleby*, 27 Hun, 44, it would seem quite clear that the wife and children are not to be put in the same boat with ordinary judgment creditors. This case was appealed, and the decision above is reported in 149 N. Y. 520, where the court held (1) that in so far as plaintiff stood on the judgment on which execution had been issued and returned unsatisfied, she was a judgment creditor, and entitled as such to reach the surplus under 1 R. S., § 57; Real Prop. L., § 78; (2) that she was not, however, restricted to this basis for relief, as to subsequent instalments of alimony under the original decree in the suit for divorce; (3) that as to this latter claim, and standing solely on the original decree, she was *also a creditor* under the statute; that in accordance with the doctrine of *Romaine* v. *Chauncey*, 129 N. Y. 566, she was not a creditor in a general sense; but that she was so, nevertheless, in a certain sense: "The will, as we have seen, contains no direction for the accumulation of surplus. Such surplus over and above that which is necessary for the support of the defendant William is, therefore, under the statute made liable in

equity to the claims of his creditors. *Equity* is here given jurisdiction to apply such surplus. And it appears to us that the plaintiff is a creditor within the spirit and intention of the statute." (4) That her right to relief is based on the duty of the husband to maintain her during life, a duty still existing notwithstanding the decree of divorce. The decree merely measures and fixes that duty. The court also held that not only the surplus accumulated, but also future surplus thereafter to accrue, might be subjected, in the present action, to the payment of past and future instalments. They also held that in determining how much of the income to allow the wife, the husband's other sources of income should be considered ; in the present case, it was held appropriate to direct the application of the entire trust income to the satisfaction of the decree ; but leave was given to defendant to apply at any time for leave to share in the income.

The main theory on which the decision is based appears to be that if the wife choose to put her claim for arrears in the shape of a judgment at law, then she stands, as to that judgment, in the position of an ordinary judgment creditor entitled to reach the surplus not needed by the husband considered as the sole beneficiary ; if, or in so far as, she stands on the original decree in the divorce suit, she is a *quasi* creditor having special claims, and is entitled in equity to reach the surplus not needed by the husband considered as only one member of a family all of whom are entitled to such support as the trust fund and the husband's other means will afford ; and that to this end she has precedence over ordinary judgment creditors. In the case in question the husband was without the jurisdiction. It is suggested by the general term (79 Hun, 268, 272), that if the husband had remained within the jurisdiction the court could have compelled the application of the trust income by compulsory process. In determining how much is needed by the defendant for support, "it is proper to consider his station in life, and the manner in which he has been reared and educated, his habits, and the means he may have to aid in his support." *Wetmore* v. *Wetmore*, 149 N. Y. 520 (531) ; *Moulton* v. *de ma Carty*, 6 Robt. 533 ; *Bunnell* v. *Gardner*, 4 App. Div. 321 ; *Andrews* v. *Whitney*, 82 Hun, 117. *Ante*, end of § 705.

(3) *Purchasers for Value.*[1]

§ 717. **Purchasers from creator of trust.**[2]—"A conveyance of an estate or interest in real property, or the rents and profits thereof, and every charge thereon, made or created with intent to defraud prior or subsequent purchasers or encumbrancers, for a valuable consideration, of the same real property, rents or profits, is void as against such purchasers and encumbrancers. Such a conveyance or charge shall not be deemed fraudulent in favor of a subsequent purchaser or encumbrancer, who, at the time of his purchase or encumbrance, has actual or legal notice thereof, unless it appears that the grantee in the conveyance, or the person to be benefited by the charge, was privy to the fraud intended." Real Prop. L., § 226. See also *Id.*, § 228, and *Id.*, § 227; 2 R. S. 137, § 1. "A conveyance of or charge on an estate or interest in real property, containing a provision for the revocation, determination or alteration of the estate or interest, or any part thereof, at the will of the grantor, is void, as against subsequent purchasers and encumbrancers, from the grantor, for a valuable consideration, of any estate or interest so liable to be revoked or determined, although the same be not expressly revoked, determined or altered by the grantor, by virtue of the power reserved or expressed in the prior conveyance or charge. Where a power to revoke a conveyance of real property or the rents and profits thereof, and to reconvey the same, is given to any person, other than the grantor in such conveyance, and such person thereafter conveys the same real property, rents or profits to a purchaser or encumbrancer for a valuable consideration, such subsequent conveyance is valid, in the same manner and to the same extent as if the power of revocation were recited therein, and the intent to revoke the former conveyance expressly declared. If a conveyance to a purchaser or encumbrancer, under this sec-

[1] For an elaborate note citing and classifying the authorities on the subject of purchaser for value without notice of the trust, and purchaser with notice from purchaser without notice; see Ames's Cases on Trusts (2d ed.), pp. 286–289, 309–310; purchaser from fraudulent assignee of chose in action, *Id.*, 310, and cases there given in full; successive purchasers or assignees from trustee, *Id.*, 326–328, notes. Also a very valuable article by Professor Ames on Purchaser for Value without Notice, 1 Harv. L. Rev., 1.

[2] See *ante*, § 700, note.

tion, be made before the person making it is entitled to execute his power of revocation, it is nevertheless valid, from the time the power of revocation actually vests in such person, in the same manner, and to the same extent, as it then made." Real Prop. L., § 231. As to trusts for the benefit of the creator, see 2 R. S. 135, § 1. *Ante*, § 710. "This article [VII., Conveyances and Mortgages] does not in any manner affect or impair the title of a purchaser or encumbrancer for a valuable consideration, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." Real Prop. L., § 230.

§ 718. Purchasers from creator of power.[1]—The statute which determines when a power becomes a lien or charge as against purchasers, is quoted *ante*, § 701. The rights of creditors where a power is reserved, are covered by Real Prop. L., §§ 124–125. The invalidity of a power intended (*e. g.*, by way of charge) to hinder, delay or defraud in the manner set forth in the statute, is covered by Real Prop. L., §§ 226, 227; 2 R. S. 137, § 1.

§ 719. Purchasers from the trustee.[2]—"Where an express trust is created, but is not contained or declared in the conveyance to the trustee, the conveyance shall be deemed absolute as

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[1] See *ante*, § 700, note.

[2] See *ante*, § 700, note. Where trustees are empowered to sell, mortgage or lease real property, and to convert realty into personalty as to them shall seem best, their general discretion must still be restricted within the limits of the interests of the estate as determined by the honest exercise of their judgment, and a purchaser or encumbrancer who knows that a sale or mortgage to him is not made for the benefit of the estate, is not entitled to protection. Thus, if the trustees execute a mortgage to secure a loan, for example, to one of themselves personally, or to a corporation in which one of them is interested, the mortgagee cannot foreclose; and even if a decree in foreclosure is procured, a purchaser at the sale cannot be compelled to accept title. Even if all the beneficiaries are joined as parties to the suit for foreclosure, and there is no actual litigation of the question of fraud, the decree may not be effective to work a destruction of the trust. And a guardian *ad litem* of a beneficiary in such a suit may, and should, move to vacate the judgment and for leave to answer and litigate the validity of the mortgage. *Boscowitz* v. *Held* (N. Y. Special Term), N. Y. Law Journal, Dec 5, 1896, p. 1.

to . . . subsequent purchasers from the trustee, without notice and for a valuable consideration." Real Prop. L., § 84. *Harrington* v. *Erie Co. Savings Bank*, 101 N. Y. 257. But not as to purchasers with notice. *People* v. *Merchants' Bank*, 35 Hun, 97; *Cumberland Coal and Iron Co.* v. *Sherman*, 30 Barb. R. 553. If the trust is expressed, and authorizes a conveyance, or if the instrument gives the trustee a power to sell, the purchaser for value also takes a title valid in so far as the trust and power are valid. And so where a conveyance is made under a valid order of court. Real Prop. L., § 85. But "if the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee, in contravention of the trust, except as provided in this section [the exception relating to sales and mortgages under authority of the Supreme Court], shall be absolutely void." Real Prop. L., § 85.[1]

No one entitled to a title in fee will be compelled to accept a conveyance from a trustee who has only a life estate, unless it is clear that the trust instrument gives him power to convey in fee, or, if authority under an order of court is relied on, that the court was in fact empowered to grant such an order. *McKee* v. *N. Y. Elevated R. R. Co.*, 79 Hun, 366. In that case, the court expressed grave doubt whether L. 1891, chap. 209 (amending 1 R. S. 730, § 65, now Real Prop. L., § 85), would enable the court to authorize such a trustee to convey or release an easement in the fee. It is now clearly settled that it could have no such effect. *Ante*, § 182.

"A person who shall actually and in good faith pay a sum of money to a trustee, which the trustee as such is authorized to receive, shall not be responsible for the proper application of the money, according to the trust; and any right or title derived by him from the trustee in consideration of the payment shall not be impeached or called in question in consequence of a misapplication by the trustee of the money paid." Real Prop. L., § 88. So far as its terms go, irrespective of its position in the Real Property Law, this section would appear to apply to both real and personal property. See *Waterman* v. *Webster*, 108 N. Y.

[1] As to a purchase for value of non-negotiable securities, from the trustee, see *Roosevelt* v. *L. & R. Imp. Co.*, 11 Misc. 595, aff'd 38 N. Y. Supp. 242.

157 (165). This statute does not apply where, by the terms of the instrument under which the payment is made, the trustee is not authorized to receive it, *Waterman* v. *Webster*, 108 N. Y. 157 (165); nor where the transaction is out of the ordinary course, or in any manner the payment cannot be said to be made in good faith, as where a person makes a loan to a *third* party and the trustee puts up collateral known by the lender to belong to the estate. Here, to escape liability, the lender must see that the proceeds are applied under the trust. *Moore* v. *Am. L. & T. Co.*, 115 N. Y. 65 (78); see *People* v. *Am. L. & T. Co.*, 2 App. Div. 193; *Harris* v. *Strodl*, 132 N. Y. 392. And where one buys property from a trustee, or takes it as security for a loan to a trustee, knowing that it is trust property, he is put upon inquiry as to the trustee's power to change or vary the same. A trustee (as distinguished from an executor) presumptively holds the trust property for administration and not for sale. *Duncan* v. *Jaudon*, 15 Wall. 165; *Gottberg* v. *U. S. Nat. Bank*, 26 Abb. N. C. 50, aff'd 16 N. Y. Supp. 45, aff'd 131 N. Y. 595. One receiving property from a trustee, knowing it to be the subject of a trust and to have been transferred by the trustee in violation of his duty, takes it subject to the right not only of the beneficiary, but of the trustee, to reclaim possession or recover for its conversion. *Zimmerman* v. *Kinkle*, 108 N. Y. 282 (287); *Wetmore* v. *Porter*, 92 N. Y. 76. The statute, Real Prop. L., § 225 ("A grant of real property is absolutely void, if at the time of the delivery thereof, such property is in the actual possession of a person claiming under a title adverse to that of the grantor"), has no application to a judicial sale. For example, Talmadge owned certain land in 1842. In that year he was declared a bankrupt, and Waddell was appointed his assignee. In 1861 the bankruptcy court directed the assignee to convey to plaintiff, which he did in 1861. Defendant, in this ejectment suit, insisted that the deed to the plaintiff was void because at the time of its execution and delivery defendant was in possession, under an adverse claim. *Held*, that the statute did not apply. *Stevens* v. *Hauser*, 39 N. Y. 302 (306. 310). To the same effect is *Coleman* v. *Manhattan Beach I. Co.*, 94 N. Y. 229. The statute is intended to prevent champerty and maintenance, but a sale ordered by the court is not open to such an ob-

jection. *Id.*, p. 234; *Hoyt* v. *Thompson*, 5 N. Y. 320 (345); *Truax* v. *Thorn*, 2 Barb. R. 156; 4 Kent. Comm. 447. See *Jackson* v. *Tuttle*, 9 Cow. 233. A trustee therefore, conveying under an order of court, may give such title as he holds, even though the land is then held adversely. Compare Code C. P., § 1501. A conveyance under supposed authority of a will, by "trustees," where there is in fact no valid devise in trust, or by a donee of a power, where the power has failed because the purpose has failed, does not confer on the grantee authority to maintain an action in the name of the grantor to recover possession of the land from an occupant under Code C. P., § 1501; the statute adds nothing to the original right of the grantor. Such an action must be sustained, if at all, upon the validity of the title originally existing in the grantor. *Chamberlain* v. *Taylor*, 105 N. Y. 185 (197).

In the case below cited, a decree was entered adjudging the validity of a trust, and establishing the power of the trustees to sell the land, and directing a certain share of the proceeds, representing the interests of certain infants, to be paid into court. After entry of decree, but before sale, a third party bought said interests; he thereby took subject to the provisions of the decree, including the power in trust to sell, and the trustees' right to commissions. His right to the proceeds of the shares bought by him was thus subject to such orders as the court might make, including orders resulting from further applications by parties to the proceding, of which he had due notice, pursuant to a provision in the original decree permitting application at the foot of the decree for further directions and instructions; and if he has, before a final order, received his full share without deduction of commissions, he may be required to refund the proper amount. *Savage* v. *Sherman*, 87 N. Y. 277.[1]

§ 720. **Purchasers from donee of power.**[2]—The power being valid, and authorizing a sale or mortgage, the position of the purchaser or mortgagee thereunder is, of course, clear. See also Real

[1] As to the effect of a surrogate's decree admitting or refusing to admit a will to probate, upon a subsequent action at law involving the validity of the will in respect to real property, see *Corley* v. *McElmeel*, 149 N. Y. 228.

[2] See *ante*, § 700, note.

Prop. L., § 231. But a purchaser under a power, who knows that a condition precedent to its execution has not occurred, cannot acquire a valid title. *Sweeney* v. *Warren*, 127 N. Y. 426 (431). As to what constitutes constructive notice, or puts him on inquiry, see *Clapp* v. *Byrnes*, 3 App. Div. 284 (296) and cases cited. The fact that an executor who holds a general power of sale has not advertised for claims, or accounted, does not interfere with his conveyance of a clear title to a purchaser who knows those facts. *Wait* v. *Cerqua*, 7 N. Y. Supp. 110, aff'd 117 N. Y. 654. And if the power to sell applies to an undivided share of land, and suit is brought to partition the same, and a notice of *lis pendens* is filed, one who takes title, pending the suit, from the donee of the power, takes subject to the judgment thereafter entered. *Shannon* v. *Pentz*, 1 App. Div. 331. The question has been raised, of "the right of a purchaser in good faith, without notice, on a sale by the executor in assumed execution of a power after the power had been terminated by an election. A sale under such circumstances would at least create a cloud on the title, and an action to enjoin the sale would be an available and proper remedy. (See *Butler* v. *Johnson*, 111 N. Y. 204.)" *Mellen* v. *Mellen*, 139 N. Y. 210 (221).

The statute freeing purchasers who actually and in good faith pay money to a trustee, which he is authorized to receive, from further responsibility for its application, Real Prop. L., § 88, formerly 1 R. S. 730, § 66; *ante*, § 719; was by 1 R. S. 734, § 102, made applicable to powers. *Wait* v. *Cerqua*, 7 N. Y. Supp. 110, aff'd 117 N. Y. 654; *Behrman* v. *Von Heyn*, 15 N. Y. Supp. 604. But the present section, corresponding to § 102 (Real Prop. L., § 162), does not thus incorporate into the law of Powers the present § 88. But see *ante* as to trustees and executors, and *Moore* v. *Am. L. & T. Co.*, 115 N. Y. 65 (77). A person entitled to receive a grant in fee from the donee of a power, will not be required to accept a conveyance if it is reasonably doubtful whether the power was really intended to apply to the property in question. *Landon* v. *Walmuth*, 76 Hun, 271 (278); compare *Kilpatrick* v. *Barron*, 125 N. Y. 751, with *Fleming* v. *Burnham*, 100 N. Y. 1. The fact that a power is general in its terms, does not necessarily render it applicable to all the property disposed of by the trust instrument. Such an

intent may be negatived by the effect of other provisions. *Landon* v. *Walmuth*, 76 Hun, 271.

§ 721. **Purchaser from beneficiary of trust.**[1]—The beneficiary of an express trust has, as such, no legal title, while the trust lasts. Under certain trusts (see *ante*, Chap. IX.), he may assign his rights either for value, or as a voluntary gift; and, if he is also the remainderman, may by release extinguish the trust, and become vested in fee, and then sell. *Ante*, § 528.

§ 722. **Purchaser from beneficiary of power.**[2]—The only way in which a clear title to the real estate affected, free from the power, can be obtained from the beneficiary of the power, is through the operation of the doctrine of election (see *ante*, § 691).

(4) *Remaindermen.*[3]

§ 723.[4]—Where a remainder is limited on a trust estate, or where the fee is vested subject to a trust estate, the two estates are entirely distinct, but as they affect the same property, the respective interests of the life tenant and remaindermen are sometimes hostile. Where land was conveyed in fee to one, his heirs and assigns forever, *habendum* to receive and apply the rents to the use of B for life, the apparent intent of the entire instrument, the fact that the deed was a printed form, with the trust clause in writing, the circumstances attending the transaction and the situation of the parties, were all given weight to sustain the construction that the conveyance was in trust only, for the life of the beneficiary, and not in fee subject to that trust, so that upon the termination of the trust the land vested in a subsequent grantee of the original owner. *Richards* v. *Crocker*, 20 N. Y. Supp. 954, aff'd 143 N. Y. 631. But see *ante*, p. 356.

(5) *Dowress.*[5]

§ 724.—The fact that a will devises all testator's real property in trust for the benefit of his widow, may be, but is not necessa-

[1] See *ante*, § 700, note. [2] *Ibid.* [3] *Ibid.*

[4] The general subject of remainders after trust estates has already been discussed (*ante*, § 139 *et seq*). See also Index "Remainder."

[5] See *ante*, § 700, note.

rily, inconsistent with her dower interest therein so as to put her to an election. See Real Prop. L., §§ 178–183. So with the case of a power to sell all the real property with a provision from the proceeds for the widow's benefit. The trustee's estate, or the power, might or might not be intended to exist subject to the dower right. It is a question of testator's intention, but in order to put the widow to her election, there must be a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit given by the will. Compare *Konvalinka* v. *Schlegel*, 104 N. Y. 125 ; *Vernon* v. *Vernon*, 53 N. Y. 351 ; *Matter of Frazer*, 92 N. Y. 239 (250) ; *Asche* v. *Asche*, 113 N. Y. 232 (234) ; *Matter of Zahrt*, 94 N. Y. 605 ; *Conner* v. *Watson*, 1 App. Div. 54 ; *Gray* v. *Gray*, 5 App. Div. 132 ; *Adsit* v. *Adsit*, 2 Johns. Ch. 449 ; *Wood* v. *Wood*, 5 Pai. Ch. 596 ; *Fuller* v. *Yates*, 8 Pai. Ch. 325 ; *Savage* v. *Burnham*, 17 N. Y. 561 ; *Lewis* v. *Smith*, 9 N. Y. 502 ; *Tobias* v. *Ketchum*, 32 N. Y. 319 ; *Brink* v. *Layton*, 2 Redf. 79. If the widow is herself the donee of the power, and executes a contract of sale thereunder, without reserving her individual rights, this constitutes an election so far as to clear the land and require her to look to the proceeds for the satisfaction of her dower. *Bostwick* v. *Beach*, 103 N. Y. 414. The mere fact that after the widow accepts the provision of a will in lieu of dower, it turns out that part of such provision, *e. g.*, an attempted trust, is void, does not entitle her to be released from her election, *Lee* v. *Tower*, 124 N. Y. 370 (375), reported below 12 N. Y. Supp. 240 ; *Brown* v. *Knapp*, 79 N. Y. 136 (143) ; nor does the fact that the dower interest largely exceeded the provision under the trust, and the widow was ignorant of the facts, *Akin* v. *Kellogg*, 119 N. Y. 441. But compare *Graham* v. *Graham*, 143 N. Y. 573. See also *Mundy* v. *Munson*, 40 Hun, 304. If the entire provision in lieu of dower fails, through illegality, the widow is not bound by her election, and equity will relieve, provided the rights of creditors or of purchasers are not concerned. *Hone's Ex'rs* v. *Van Schaick*, 7 Pai. Ch. 221 (223), aff'd 20 Wend. 564. If a beneficial power over a fund be given and accepted in lieu of dower, it renders the fund free from liability to abatement as against the other property of the testator. *Betts* v. *Betts*, 4 Abb. N. C. 317 (391).

If lands vest in fee in a wife, subject to a power of sale, the husband's curtesy is defeasible by the exercise of the power. *Harvey* v. *Brisbin*, 143 N. Y. 151. And if a life estate is devised to testator's wife, with a power in her to sell, in lieu of dower, and she elects to take her dower, the power fails with the life estate. *James* v. *James*, 4 Pai. Ch. 115 (117). Executors may compound with a widow for a lump sum on a proper basis, for her release of dower rights to their grantee under a power of sale held by them. *Eagle* v. *Emmet*, 4 Bradf. 117. Any trust created by testator in his real property, is of course subject to the widow's right to dower. Real Prop. L., § 183. But the same principle does not apply to curtesy, which cannot take effect upon property disposed of by the wife whether by deed or will. *Hatfield* v. *Sneden*, 54 N. Y. 280 (287). If a husband creates a trust, and also, under the trust or otherwise, makes a provision for the wife in lieu of dower, her election to take her dower does (*Estate of Friedman*, Daily Law Journal, February 6th, 1892, p. 1130) or does not (*Hotaling* v. *Marsh*, 132 N. Y. 29) invalidate the trust provision, according as it does or does not fatally disarrange the entire scheme of the will. See *post*, Chap. XXVIII.

CHAPTER XXVI.

JUDICIAL CONTROL.

§ 725. In general.—The general jurisdiction of equity over trusts and trustees, in construing the trust instrument ; directing, controlling and enforcing the execution of the trust ; protecting the beneficiary ; calling the trustee to account ; removing the trustee, or allowing him to resign, and filling vacancies in the trusteeship ; and its corresponding jurisdiction over powers in trust, are discussed under the appropriate heads in other chapters, as also the corresponding, but limited jurisdiction of the Surrogate's Court in the same field, over testamentary trustees, and the donees of testamentary powers. See *Savage* v. *Olmstead*, 2 Redf. 478 ; *Brennan* v. *Lane*, 4 Dem. 322 ; *Gladding* v. *Follett*, 2 Dem. 58, aff'd 30 Hun, 219, aff'd 95 N. Y. 652 ; *Brittin* v. *Phillips*, 1 Dem. 57 ; *Furniss* v. *Furniss*, 2 Redf. 497 ; *People* v. *Marshall*, 7 Abb. N. C. 380 ; *Estate of Sherry*, 7 Abb. N. C. 390. Some further points here call for attention.

The court is always open to the trustee who has need of instructions to guide him when his proper course is doubtful, though frequent applications for advice are not encouraged, and he must not seek the aid of the court unless it is fairly necessary. *Matter of Brewer*, 43 Hun, 597 (600 *et seq.*) ; *Smith* v. *Rockefeller*, 3 Hun, 295 (297) ; note, 5 Abb. N. C., p. 346 ; *Anonymous* v. *Gelpcke*, 5 Hun, 245 (251–252) ; and if the trustee, before adopting a given course, should have sought authority from the court, yet if, in acting without judicial direction, he pursues a course which would have been approved if approval had been asked, the court will, on his subsequent accounting, approve the steps actually taken. See *Matter of Reed*, 18 Misc. 285 (291). The court may, in a proper suit, and on proper evidence, and with the parties before it, decree a trust to be void. But this is not a destruction of a valid trust, but a finding that

the attempted trust never existed. *Cuthbert* v. *Chauvet*, 136 N. Y. 326 (330). And it will not disturb a trust though obviously void, when its validity is not in issue before it. See *Kenyon* v. *See*, 94 N. Y. 563 (563–564, 568). On the other hand, an authorization by a testator of his executors, to apply to the court if expedient or requisite, for any orders amending the form or expression of a certain devise as far as may be necessary to prevent it from being inconsistent with any law or statute of the State, and to act upon such modifications as though the same had been fully expressed in the will, does not save the devise if void. See *Cruikshank* v. *Home for the Friendless*, 113 N. Y. 337 (340).

By L. 1893, ch. 701, and Real Property Law, § 93, the title to the property affected by trusts for religious, educational, charitable or benevolent purposes, referred to therein, vests in the Supreme Court if no person is named as trustee in the instrument creating the trust, and the court has control thereof. Under §§ 85, 86 and 87 of the Real Property Law, the court is empowered in certain cases to authorize a sale, lease or mortgage by a trustee. The scope and application of these provisions have been already considered, *ante*, §§ 182, 453 *et seq.* *Matter of Roe*, 119 N. Y. 509 ; *Matter of Clarke*, 59 Hun, 557. The jurisdiction to direct a sale, mortgage or lease of the property of infants, has also been considered, *ante*, § 582. See *Dodge* v. *St. John*, 96 N. Y. 260 (263) ; *Anderson* v. *Mather*, 44 N. Y. 249 (260) ; *Dodge* v. *Stevens*, 105 N. Y. 585 ; *Matter of Roe*, 119 N. Y. 509 ; *Losey* v. *Stanley*, 147 N. Y. 560. But an order of the court will not validate the attempted exercise of a power to sell on a named contingency, if the contingency has not in fact happened, *Griswold* v. *Perry*, 7 Lans. 98 (104) ; though of course the court has power, if the issue is presented, and the parties are before it, to find that it has happened. See the next section.

§ 726. **Execution by court.**—In certain cases (Real Prop. L., §§ 91, 162 ; L. 1882, Ch. 185) the trust or power in trust vests in the court itself, and is carried out by it or by a person appointed by it for that purpose. A trust or power may also vest in the Supreme Court in case of vacancy in the trusteeship, even apart from statutory provisions. See further, *ante*, § 121 *et seq.* If

the trust power be such as to pass to a successor in the trusteeship, the court may, instead of appointing a new trustee, itself exercise a discretion reposed in the trustee. *Hull* v. *Hull*, 24 N. Y. 647; *Royce* v. *Adams*, 123 N. Y. 402. So if all the trustees die or renounce, the court may appoint a trustee, but reserve to itself the execution of the power, *Mulry* v. *Mulry*, 89 Hun, 531 (540), or exclude the trustee from its exercise save by permission of the court. *Id.*, p. 542. And the court may, in a proper case, thus assume and exercise the discretion given to trustees even though a person filling that office is alive and acting; thus, where several trustees were appointed by will, and all renounced save one, who was also a beneficiary, the court passed upon the propriety of mortgaging the property, and having exercised this function itself, it directed the execution of the mortgage instrument by the trustee. *Rogers* v. *Rogers*, 111 N. Y. 228 (238).

And when a given power is to be exercised only upon the consent of the trustee, as such, of a certain trust, and the trust devolves on the court, the consent of the court, as the representative of the trust, then becomes essential to the due exercise of the power. *Ante*, end of § 641. In *Correll* v. *Lauterbach*, cited in the section just referred to, Patterson, J., seems to suggest that if in such a case the Supreme Court has, under its statutory authority, appointed a person to execute the trust (Real Prop. L., § 91), the consent of that person would be proper. This view would rest on the theory that a person thus appointed becomes a substituted trustee. But on appeal, in the same case (*Correll* v. *Lauterbach*, N. Y. Law Journal, Dec. 15, 1896, p. 1), the Appellate Division, in affirming the decision below, hold that even after it has appointed such a person, the court itself still continues to be the trustee, and that the consent of that person would not suffice, but the consent of the court, as trustee, would be requisite. This view of the position of the person appointed by the court to execute a trust which has devolved on the court through the death of the trustee, a view confined, so far as has been observed, to the Appellate Division of the First Department, has been already examined at some length (*ante*, pp. 83-86). The suggestion is ventured that there is in this respect a distinction between the two following

classes of cases: (*a*) Where the sole or last surviving trustee dies, the court becomes at once the trustee, and may thereafter, if it sees fit, continue to act as such, through an agent or any number of agents, and may appoint one person to do one act, and another to do another act, the court retaining full control, with power to change its agents as often as desired, without necessity of formal removal and without any reference to the grounds upon which the removal of a trustee is usually based, *e.g.*, it may direct a guardian of the beneficiary to execute a deed of the trust property; in all such cases the agent of the court is obviously not a trustee; thus, he would be entitled to appropriate compensation for his services (like any agent, clerk, accountant, bookkeeper, collector, etc., when duly employed by an individual trustee, *ante*, § 326), and not necessarily to "commissions" unless, perhaps, where his duties and services are in fact general; so, it would appear that he might resign without any formal proceedings. (*b*) If in the same case the court sees fit to appoint a technical trustee, instead of an agent, it may do so (*ante*, pp. 83–86), and vest him with the legal title to the property (*ante*, § 343; *post*, § 727), and thus put him in a position where he is entitled to regular commissions, and nothing more, and where he can resign, or be removed, only through formal proceedings.

It would seem, therefore, that the question, in a given case, would turn on the form of the decree appointing him, and the intention of the court, as there evidenced, to either make him a mere agent of the court, or to make him a technical trustee; and that in the latter case, if a certain power could only be exercised if the trustee in question, as such, consented, it would be the new trustee thus appointed, and not the court itself which had ceased to be trustee in favor of its appointee, who should give the required consent.

The view that where a sole or last surviving trustee dies the court must continue to act as trustee, and cannot appoint a new trustee as successor, would lead, also, to the following results: (1) That if all resign, or all are removed, the court may appoint a new trustee (Real Prop. L., § 92), while if all die, it must appoint a mere agent; an inconsistency which should not be favored in the absence of necessity; (2) that if the trust is cre-

ated by will, and all the trustees die, the surrogate may appoint a new trustee (Code C. P., § 2818 ; *Royce* v. *Adams*, 123 N. Y. 402), while the Supreme Court could only appoint a mere agent —an inconsistency equally glaring.

It is believed that in such cases the Supreme Court has power to transfer the trust and the title from itself to a new trustee, retaining such power of supervision as it always has over all trustees. See *ante*, pp. 83–86.

§ 727. **Enforcing conveyance.**—Apart from legislative provisions, a court of equity has no power to transfer the legal title from one person to another, by the mere force of its decree. Its only inherent jurisdiction to that end lies in its power to punish for contempt the party refusing to convey as it has directed. If he still refuses, or if he is without the jurisdiction, equity, unaided by statute, is helpless. And this is equally true though the party directed to convey is a trustee. *Felch* v. *Hooper*, 119 Mass. 52, quoted in full in Ames's Cases on Trusts, 246, and notes ; *McCann* v. *Randall*, 147 Mass. 81 (99) ; *Hart* v. *Sansom*, 110 U. S. 151, there cited. The mere appointment of a new trustee by a court of equity, does not, apart from statute, clothe him with the legal title. This defect in the power of courts of equity has been remedied by several statutes in New York. Thus, by Code C. P., §§ 717, 718, it is provided that if a trustee is duly directed by order or judgment to make a deposit or delivery, of personal property in his possession or under his control, which, being the subject of the action, is held by him as trustee for another party, or where a judgment directs him to convey real property, the court may, if he disobeys, punish the disobedience as a contempt, or may, by order, require the sheriff to take, and deposit or deliver the money or other personal property, or to convey the real property, in conformity with the direction of the court. A similar provision relating to infant trustees is found in Code C. P., §§ 2345–2347. See also Real Prop. L., §§ 91, 92. Whether the statutes authorizing resignation, or removal of a trustee, and the appointment of a successor, operate by their own force to effect a devolution of the legal title so that no provision requiring a conveyance is needed in the decree or order, might perhaps be open to question. But it would appear that

they do have such an effect, and that a trustee appointed by the court under its statutory authority thereby succeeds to the legal title, as distinguished from the case where the appointment is made under the inherent power of a court of equity. *Lahey* v. *Kortright*, 132 N. Y. 450 (458). See *ante*, § 343. It is clear, however, that if the decree does not contemplate a transfer of legal title at all, or until a conveyance is executed, the present statutes do not operate to the contrary. *Ante*, § 343. The fact that the property is without the State does not oust the jurisdiction of equity to compel a conveyance, by injunction and attachment, if it has jurisdiction over the person. *Newton* v. *Bronson*, 13 N. Y. 587. See *Jones* v. *Jones*, 8 Misc. 660. But if in such a case the property and the trustee are both without the jurisdiction, equity cannot act. Ames's Cases on Trusts (2d ed.), p. 249, note. In the note just cited, Professor Ames criticises *Curtis* v. *Smith*, 60 Barb. R. 9, as disregarding the principle last stated. It related to a case where the trustee had been appointed by a will proved here, and had then resided here ; the beneficiaries were still here. The court held that the New York court had power to remove him, but expressly left open the question whether the successor to be appointed here could claim title in another State without first securing authority from the courts there. See also 1 Perry on Trusts, § 71. On the general subject of the transfer of title upon death, resignation or removal of a trustee and the appointment of a successor, see 1 Perry on Trusts, § 284.

§ 728. Contempt proceedings.—The enforcement by contempt proceedings, of a decree of a Surrogate's Court, directing the payment of money, or requiring the performance of any other act, is regulated by Code C. P., § 2555, which in particular provides that where the delinquent is a testamentary trustee, and the decree relates to the fund or estate, the surrogate may enforce the decree of his court, as prescribed in that section, either without issuing an execution, or after the return of an execution, as he thinks proper. The general subject of proceedings to punish for contempt, in courts of record, is covered by Code C. P., §§ 2266–2292 ; 8 *et seq.* ; 1241 ; and various statutory provisions relating to special cases. See also the provisions of the Penal Code ; and *ante*, § 255.

CHAPTER XXVII.

THE STATUTE OF LIMITATIONS.

§ 729. **Introduction.**—Actions or proceedings by a beneficiary against his trustee are of three classes : (1) Those where he must sue at law ; (2) those where he must sue in equity (or now in certain cases proceed in the Surrogate's Court) ; and (3) those where the remedies in equity and at law are concurrent. The application of the statute of limitations varies according as a given case falls within one or another of these three classes.

(1) *At Law.*[1]

§ 730.—The general rule is well established that " the remedy of beneficiaries of a trust, against a trustee, where the account is open and continuing, and the accounts of the trustee have not been settled and adjusted and a balance ascertained, is in an action for an accounting in equity ; and that an action at law, either for money had and received, or in any other form, will not lie in the first instance." *Van Camp* v. *Searle*, 147 N. Y. 150 (161) ; *Husted* v. *Cruikshank*, 14 N. Y. Supp. 526. " In the latter case, the court, on demurrer to the complaint, held that the action being one at law would not lie to recover plaintiff's share in his estate merely because it had been determined that the plaintiff was entitled to the one-eleventh part of the estate, there having been no accounting to determine the amount of such share which the trustee was to pay to the plaintiff." *Husted* v. *Thomson*, 7 App. Div. 66, where, at p. 69, the court say : " This action at law cannot, therefore, be maintained. The plaintiff must, in the action for an accounting brought by others, become a party and have the amount of his share definitely ascertained therein, or else bring a separate action himself for that

[1] As to which see *ante*, § 29, note ; § 374.

purpose and obtain the same relief in such action before he can maintain such an action as this at law. The theory of such an action as this is that the amount to which the plaintiff is entitled has become definitely ascertained by judicial determination, and that the trustees' only duty is to pay over. In effect the action is personal in its nature for a failure of duty on the part of the trustees. It is in the nature of an action for money had and received by the trustee for the plaintiff. (*Power* v. *Hathaway*, 43 Barb. R. 214, 219.)" If the amount due has thus been ascertained (or if by agreement it has been fixed, and the trustee has in due form expressly agreed to pay it over, *Dias* v. *Brunell's Ex'r*, 24 Wend. 9), of course a cause of action at law at once arises, and the statute begins to run. But even if the accounts have been adjusted, and the balance due and payable has been definitely ascertained and fixed, so that the beneficiary is in a position to bring his action at law to recover the amount due, he may of course make a new arrangement with the trustee, by which the money accrued and payable by the trustee to the beneficiary, takes on the nature of a *deposit* in the hands of the trustee individually, not to be repaid at a fixed time, or only upon a special demand, or other personal property held by a trustee individually may be regarded as delivered to him by the beneficiary, and not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency. In such case the time must be computed from the actual demand itself. Code C. P., § 410 ; *Boughton* v. *Flint*, 74 N. Y. 476 (481–482) ; *Payne* v. *Gardiner*, 29 N. Y. 146 (167) ; *Downes* v. *Phœnix Bank*, 6 Hill, 297 ; *Dorman* v. *Gannon*, 4 App. Div. 458.

It is provided by § 410 of the Code, that " where a right exists, but a demand is necessary to entitle a person to maintain an action, the time, within which the action must be commenced, must be computed from the time, when the right to make the demand is complete, *except* . . . where the right grows out of the receipt or detention of money or property, by a . . . *trustee* . . . the time must be computed from the time, when the person, having the right to make the demand, has actual knowledge of the facts, upon which that right depends." *Merino* v. *Munoz*, 5 App. Div. 71. This section is a mere codification of the existing law, and introduced nothing new. *King* v. *Mackellar*,

109 N. Y. 215 (224). And if the relation between the parties is merely that of debtor and creditor, the statute begins to run from the time when the right to make the demand is complete. *Wood* v. *Young*, 141 N. Y. 211.

(2) *In Equity.*

§ 731. **General principles.**—Originally, the statute of limitations did not apply in terms to courts of equity. In suits of *exclusive* equitable cognizance it was merely adopted there as a fit and convenient rule, but with its own restrictions, which were, that in cases of fraud, and of trust, it should not be applied; but although equity refused, in such cases, to apply the statute, it refused relief in any given case where suit had been unduly delayed, and the claim had become *stale*. *Murray* v. *Coster*, 20 Johns. R. 576 (583); *Decouche* v. *Savetier*, 3 Johns. Ch. 190 (216); *Hamer* v. *Sidway*, 124 N. Y. 538 (548–551); *Flint* v. *Bell*, 27 Hun, 155 (158), aff'd 101 N. Y. 688; *Sheldon* v. *Sheldon*, 133 N. Y. 1 (5); *Matter of Camp*, 126 N. Y. 377 (389); *Sherman* v. *Parish*, 53 N. Y. 483 (493); *Wilmerding* v. *McKesson*, 103 N. Y. 329 (341); *Von Sachs* v. *Kretz*, 72 N. Y. 548 (556). But if the trustee openly repudiated the trust and the beneficiary had notice, the time began to run. *Hubbell* v. *Medbury*, 53 N. Y. 98; *Davis* v. *Davis*, 86 Hun, 400. When the trust relation ceased, the statute began to run. *Kane* v. *Bloodgood*, 7 Johns. Ch. 90 (114); *Gilmore* v. *Ham*, 142 N. Y. 1 (10). The rule applied to express trusts, and not to those implied by the law for the purposes of justice. *Mills* v. *Mills*, 115 N. Y. 80 (86); *Price* v. *Mulford*, 107 N. Y. 303 (308); *Lammer* v. *Stoddard*, 103 N. Y. 672. They must also be trusts in the technical sense—that is, such as are the mere creatures of equity. *Kane* v. *Bloodgood*, 7 Johns. Ch. 90, 111, 114, 120; *Murray* v. *Coster*, 20 Johns. R. 576 (585). The exemption applied only to cases of trust cognizable exclusively in equity and not at law, *Matter of Neilley*, 95 N. Y. 382 (390 and cases there cited); and not to those where a person not a trustee got possession of trust property. *Pierson* v. *McCurdy*, 33 Hun, 520 (530), aff'd 100 N. Y. 602; *Garvey* v. *N. Y. Life Ins. & Trust Co.*, 7 N. Y. Supp. 818.

§ 732. **Stale claims—Laches.**—In *Zebley* v. *F. L. & T. Co.*, 139 N. Y. 461 (467), defendant was a trustee who had sold property, and this suit was brought for an accounting. The complaint was demurred to, on the ground, among others, that the claim was stale. The court thus explain the principles applicable to stale claims :

" Whatever may in the end prove to be the merits of the controversy, the pleading must be held sufficient to require an answer, unless two objections suggested upon the argument and sustained by the courts below, appear to be tenable. These are : (1) That the complaint shows that the claim is a stale one, which a court of equity will not entertain. . . . The learned counsel for the defendant relies upon the case of *Speidel* v. *Henrici* (120 U. S. 377), to sustain the first proposition. In that case, the court sustained a demurrer to a claim for accounting, based upon an uncertain and indefinite trust, not arising by deed, in regard to which the plaintiff had been silent for nearly fifty years. The conclusion was sustained by authority found in the decisions of the Federal courts, and based upon the rules and practice of equity as administered there. In this state, however, it has long been settled that such circumstances are only evidence upon an issue of fact with respect to the existence of the claim, the ownership of the party setting it up, or its subsequent payment, settlement or extinguishment in some way. (*Macaulay* v. *Palmer*, 125 N. Y. 742 ; *Jackson* v. *Sackett*, 7 Wend. 94 ; *Bean* v. *Tonnele*, 94 N. Y. 381 ; *Parker* v. *Foote*, 19 Wend. 309 ; *Miller* v. *Smith's Ex'rs*, 16 Wend. 425 ; *Jackson* v. *Hotchkiss*, 6 Cow. 401.)

" The inference, with respect to the existence of a claim in fact, to be drawn from such facts and circumstances may be strong or otherwise depending upon the peculiar features of each particular case, but generally it cannot be said, as matter of law, that a claim or cause of action, not barred by the Statute of Limitations, is defeated by mere lapse of time alone. Under our system of procedure, even where the complaint upon its face discloses a cause of action barred by the Statute of Limitations, the question cannot be raised by demurrer, but by answer, and certainly a party ought not to be permitted to avail himself of the objection that the demand is stale, in consequence of facts not

constituting a statutory bar, on easier terms than he could avail himself of the Statute of Limitations. A court of equity undoubtedly may, under proper circumstances, in the exercise of discretion, decline to aid a party in the enforcement of a stale demand, but it is believed that such a result can seldom, if ever, be reached upon a demurrer to the bill, and without full examination of all the facts and circumstances of the case. Generally the obligation of a trustee to account is not affected by the Statute of Limitations until a denial or repudiation of the trust." On the other hand, even in cases where time has begun to run, but has not yet run out, the period of limitation of equitable actions, fixed by the statute, is not, where a purely equitable remedy is invoked, equivalent to a legislative direction that no period short of that time shall be a bar to relief in any case; it does not preclude the court from denying relief in accordance with equitable principles for unreasonable delay, although the full period of ten years has not elapsed since the cause of action accrued. *Calhoun* v. *Millard*, 121 N. Y. 69 (82); *People ex rel. Collins* v. *Donohue*, 70 Hun, 317 (322).

(3) *Concurrent Remedies.*

§ 733.—Where the cause of action is such that complete relief in some form might be sought either in equity or at law, at the option of the complainant, then, though a trust may in some sense be involved, the statute applies and the period of limitation, in either court, will be that established for actions at law. *Butler* v. *Johnson*, 111 N. Y. 204 (213 *et seq.*); *Matter of Neilley*, 95 N. Y. 382 (390, and cases there cited); *Roberts* v. *Ely*, 113 N. Y. 128 (133). The ten years' limitation (Code, § 388) applies only where the equitable remedy is the only one available, and no action lies at law (cases last cited). *Thacher* v. *Hope Cem. Ass'n*, 46 Hun, 594 (597); *Murray* v. *Coster*, 20 Johns. R. 576 (585). Courts of equity, in cases of concurrent jurisdiction, adopt this principle not merely by analogy, but as a strict legal requirement imposed on them by the law, though not in express terms. *Butler* v. *Johnson*, 111 N. Y. 204 (214); *Calhoun* v. *Millard*, 121 N. Y. 69 (81). And a concurrent remedy at law also renders applicable to a proceeding in a Surrogate's Court, the legal limitation. *Paff* v. *Kinney*, 1 Bradf. 1 (4–5). Thus a proceed-

ing to enforce payment by an executor of a legacy or distributive share, is barred at the same time as the right to sue for the same cause at law. *Matter of Miller*, 15 Misc. 556 (559–560), and numerous cases there cited.

(4) *Under the Present Statute.*

§ 734. **The statute.**—Subsequently, a sweeping statute was passed, providing periods of limitation for specified legal causes of action, and also a general limitation covering all exclusively equitable causes of action. This latter provision (formerly Code of Procedure, § 97) now constitutes § 388 of the present Code, and reads as follows: "An action, the limitation of which is not specifically prescribed in this or the last title, must be commenced within ten years after the cause of action accrues" (applicable also to Surrogates' Courts, *Paff* v. *Kinney*, 1 Bradf. 1 (4); *House* v. *Agate*, 3 Redf. 307 (311); *Cole* v. *Terpenning*, 25 Hun, 482; and to other special proceedings within its scope. Code C. P., § 414, subd. 4, par. 2.)

§ 735. **Effect in equity.**—The bearing of this provision on the former exemption of trusts, in equity, as above set forth, was touched upon, but not definitely determined, in two cases. In *De Pierres* v. *Thorn*, 4 Bosw. 266 (288–289) the court said: "Since the Revised Statutes of 1830, covering every imaginable case of relief in a Court of Equity, and fixing a statutory limitation in each, I have supposed that the doctrine of a Court of Chancery as to lapse of time, and the analogy to the old Statutes of Limitation, was at an end. The Legislature had substituted a definite and comprehensive rule." And in 1871, in *Loder* v. *Hatfield*, 71 N. Y. 92 (104), the court said: "Besides, it is now worthy of consideration, that the distinction in actions and jurisdiction of causes of action, is abolished; and that one court entertains all (Code [of Procedure], § 69). Now that the Code ([of Procedure], § 74) prescribes a rule of limitation for all civil actions, it is questionable whether the rules formerly prevailing in equity, by which no statute of limitation was applicable to suits in equity for certain causes of action, may make head against a positive and comprehensive statute." But any doubt on this point is now laid at rest by the ruling of the Court of

Appeals in *Gilmore* v. *Ham*, 142 N. Y. 1, where, at page 6, the court say that as a result of the present Statute of Limitations, there is now "a fixed limitation for every cause of action, whether legal or equitable. . . . This provision in the Code of 1848 and continued since [Code C. P., § 388 above quoted], has done away with the old rules as to cases cognizable only in courts of equity, and subjected all alike to some statutory limitation. So far as I have examined the authorities in this State since the adoption of the Code, I have found no denial of the application of its provisions to any form of equitable action, unless cases of a continuing right, accruing newly every day (*Miner* v. *Beekman*, 50 N. Y. 337 ; *Schoener* v. *Lissauer*, 107 N. Y. 117), may be said to form an exception, although it is quite apparent that they are not inconsistent with the uniform and universal rule. They serve, not to break it, but to show how difficult it occasionally is to determine when the right to the equitable relief arises, and when the cause of action so accrues as to set running the appropriate limitation. I shall assume, therefore, that either the six year or the ten year limitation applied to the plaintiff's cause of action."

It will be noticed that to the statements of the preceding paragraphs, relating to the former rules, cases decided before the old Code, and cases decided since the statute relating specifically to all equitable causes of action, have both been cited. In fact, all these statements represent, in some sense, the present, as well as the former law, and it is still true that (except in the case of stale claims, see cases cited *ante*, § 732) the mere lapse of time does not relieve the trustee from the necessity of accounting in cases of continuing technical express trusts, until the trust ends or is openly repudiated by the trustee with notice to the beneficiary. (Cases cited *supra*.) How, and in what sense, this rule is consistent with § 388 of the Code, which covers all equitable causes of action, and requires them to be brought within ten years from the time when the cause of action accrues, will now be considered.

§ 736. **Effect on accountings.**—As seen above, there are no real exceptions to the application of § 388 of the Code. *Gilmore* v. *Ham*, 142 N. Y. 1 (6). Yet there are decisions which

apppear at first sight, to be inconsistent with it. Thus in *Post* v. *Benchley*, 48 Hun, 83 (90) (appeal dismissed 110 N. Y. 665), an accounting was granted extending back over more than ten years, though the statute had been pleaded. So in *Matter of Camp*, 126 N. Y. 377 (388 *et seq.*), it was held that a ward might demand an accounting from his guardian though sixteen years had elapsed since he came of age, and that the statute did not apply. Also *Pease* v. *Gillette*, 10 Misc. 467 (472); *Matter of Grandin*, 61 Hun, 219, and cases there cited; *Matter of Beyea*, 10 Misc. 198; *Zebley* v. *F. L. & T. Co.*, 139 N. Y. 461 (469); *Matter of Underhill*, 11 N. Y. Supp. 113; *Matter of Van Wert*, 3 Misc. 563; Bishop on Insolvent Debtors (3d ed.), p. 544; *Davis* v. *Davis*, 86 Hun, 400. Under the principle laid down in *Gilmore* v. *Ham*, *supra*, these decisions must be explainable on some theory consistent with § 388, and be shown to constitute only an apparent exception. Two apparent exceptions are mentioned in *Gilmore* v. *Ham*, 142 N. Y. 1 (6). These are:

(*a*) Cases where the accrual of a right of action more than ten years prior to suit brought is only apparent, and in reality no cause of action, in the sense required, arose until a later date. (*b*) *Cases of continuing right*, accruing newly every day. In the class of cases under consideration, the only difficulty is, in ascertaining when it is that a cause of action, such as to start the statute running, does arise. In one sense, wherever a trust exists, there exists also (with some petty and here immaterial exceptions) a right, in equity or in the Surrogate's Court as the case may be, to call the trustee to account, and require him to show whether he has on hand any surplus of rents and income payable to the beneficiary, or to have the amount thereof, or of the corpus, for which he is liable, definitely determined. But even though, in such a case, and pending the trust, the beneficiary knows that there are accrued funds in the trustee's hands, to which he is entitled, it would seem that if he does not care to require an accounting for more than ten years, the case might be brought within the principle of the cases above cited (*Miner* v. *Beekman*, 50 N. Y. 337; *Schoener* v. *Lissauer*, 107 N. Y. 117) relating to a *continuing right*, accruing newly every day. Those cases involved a cloud on a title, and it was said that the statute did not affect them, because it is not the creation of the cloud,

but its existence, that constitutes the cause of action, and the cloud exists, at the end of eleven years, as much as at the end of five years. In so far, therefore, as it may be said that any cause of action exists against a trustee, where he admittedly holds only in trust, and makes no personal claim, and the beneficiary does not care to disturb his possession or call for information, it might be said that it is not the creation of such a relationship, but the existence of it, that gives the cause of action. But however this may be, it is certainly true that in the absence of any refusal of the trustee to pay over what may be due, if anything, an action or proceeding would be nothing more than a mere search for information, based, theoretically at least, on the assumed willingness of the trustee to pay over any amount which may be found payable as a result of the judicial investigation. This is, of course, in one sense a cause of action. It is believed that this is such a cause of action as is held by equity not to set the statute running. It is purely optional with the beneficiary whether he will seek information or not, during ten, or twenty, or thirty years. And during the same period the trustee may himself bring on the same investigation on his own part. So long as the trustee admits, expressly or by implication, that he holds the property, or the rents, or income, if any, in trust, as the property of the beneficiary, under the terms of the trust, and the latter is willing to leave them, if any, in the trustee's hands, there is nothing to sue about. No dispute, no controversy, as to respective rights, exists. The property, principal and income, is already in the possession of the beneficial owner, for the possession of the trustee is the possession of the *cestui que trust.* It is only the custody, or the right to custody, in trust, that is left to the trustee; this is the arrangement, and essentially it cannot be said that while one holds corpus or income under an admitted express trust, and the other desires him so to continue to hold, and does not care to take it away, any cause of action exists in such sense as to require the beneficiary to sue when there is nothing he wants to sue for, on penalty of finding later, when he does wish to secure payment, that he is barred because he failed to sue when he had no demand to make. "If a trustee is in possession, and does not execute his trust, the possession of the trustees is the possession of the *cestuis que trust;* and if the only cir-

cumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title." Per Lord Redesdale, *Hovenden* v. *Annesley*, 2 Sch. & Lef. 607 (633). It still seems true, therefore, that in cases of continuing technical express trusts, the statute does not run ; and that this does not form an exception to § 388 of the Code ; it only means that in such cases no cause of action has accrued to start the time running under § 388. The cases where time does run, in favor of a trustee, confirm this view. For as soon as the trustee openly repudiates the trust, and the beneficiary has notice that the trustee claims to hold adversely, here a controversy exists, a cause of action arises, and time begins to run. *Hubbell* v. *Medbury*, 53 N. Y. 98 (101) ; *Reitz* v. *Reitz*, 80 N. Y. 538 (544) ; *Davis* v. *Davis*, 86 Hun, 400 (402) ; *Zebley* v. *F. L. & T. Co.*, 139 N. Y. 461 (469) ; *Hill* v. *McDonald*, 58 Hun, 322 (324-325) ; *Hubbell* v. *Sibley*, 50 N. Y. 468.[1]

§ 737. **Action on sealed instrument.**—The fact that a deed of trust to pay debts is under seal, does not render a suit against the trustees to enforce payment of a promissory note, an action *on a sealed instrument*, so as to render the six years statute inapplicable. *Hill* v. *McDonald*, 58 Hun, 322 (325). And the same principle applies where the claim of plaintiff is based on a provision in a will which is in fact under seal. *Loder* v. *Hatfield*, 71 N. Y. 92 (104) ; *Zweigle* v. *Hohman*, 75 Hun, 377 ; *Toles* v. *Adee*, 91 N. Y. 562.

§ 738. **Waiver of bar.**—If the statute has run, and the claim is barred, the bar may be waived by a voluntary accounting. *Wyckoff* v. *Van Siclen*, 3 Dem. 75. Compare cases cited *ante*, § 736, first paragraph.

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[1] Within this latter class would also fall cases where the trustee, without repudiating the trust *in toto*, has repudiated it in part by doing acts inconsistent with the trust relationship, as in buying in trust property personally ; or where he does any specific act, even without wrongful intent, which the beneficiary claims to be wrongful, such as investing in unauthorized securities. Here, if the beneficiary knows the facts, a cause of action at once arises ; and the beneficiary's claim would be affected by the statute, and might also be earlier barred under the general doctrine of acquiescence, ratification and estoppel. See *post*, § 741 ; *ante*, p. 181.

§ 739. **Disability.**—Another case where the suit may be delayed for a period longer than ten years, exists where the beneficiary, through infancy or other disability, cannot sue at a time when, if not disabled, he might have done so. Code, §§ 396, 402, 404. So, where the trustee is absent from the State. Code, § 401 *et seq.*

§ 740. **No acting trustee—Result.**—Where a sole trustee of an express trust renounces, then there is no one legally existing in whom a cause of action on behalf of the estate can vest, until a trustee is appointed by the court. In the meantime, therefore, the running of the statute is suspended. *Dunning* v. *Ocean Nat. Bank*, 61 N. Y. 497.

§ 741. **Beneficiary's right to sue.**—Where a trustee has bought in personally, and openly claims as his own, property which, as trustee, he had no right to buy save for the trust estate, the fact that he could not sue himself, to set aside the sale, or to call himself to account, does not suspend the running of the statute. In such a case, the beneficiary may bring suit, and therefore the time continues to run. *Hubbell* v. *Medbury*, 53 N. Y. 98.[1]

§ 742. **Claim subject to precedent trust.**—A claim to a fund, subject to the precedent life interest of another therein, does not in general give rise to any cause of action until the death of the life beneficiary. *Matson* v. *Abbey*, 70 Hun, 475, aff'd 141 N. Y. 179; *Gilbert* v. *Taylor*, 148 N. Y. 298; *Somerset* v. *Earl Poulett* (1894), 1 Ch. 231. Compare *ante*, 198, note.

§ 743. **Co-trustee—Contribution.**—Where there are two trustees, both liable for a loss resulting from an unauthorized act, *e.g.*, the misappropriation by a third party of funds improperly

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[1] The Statute of Limitations may of course run against the trustee, in regard to his claim as such, against a third party. If this result is due to his neglect, he is liable accordingly, as for a *devastavit*. *Harrington* v. *Keteltas*, 92 N. Y. 40.

entrusted to him ; and the beneficiary and one trustee, acting on behalf of the estate, bring suit against the other trustee (*ante*, p. 118) ; and the defendant in his answer claims contribution against the plaintiff trustee (*ante*, § 284), it has been held that the right to contribution creates a debt, which does not come into existence until the beneficiary has obtained judgment against the defendant. *Robinson* v. *Harkin* (1896), 2 Ch. 415.[1]

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[1] For an explanation of the present English Statute of Limitations as applied to trustees, see Birrell's "Duties and Liabilities of Trustees" (Macmillan, 1896), pp. 153 *et seq.* ; *Thorne* v. *Heard* (1894), 1 Ch. 599 ; *In re Gurney* (1893), 1 Ch. 590 ; *In re Bowden*, 45 Ch. D. 444 ; *Swain* v. *Bringeman* (1891), 3 Ch. 233 ; *In re Page Jones* v. *Morgan* (1893), 1 Ch. 304 ; *Somerset* v. *Earl Poulett* (1894), 1 Ch. 231 ; *How* v. *Earl Winterton* (1896), 2 Ch. 626.

"An acknowledgment or promise, contained in a writing signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract, whereby to take a case out of the operation of this title [relating to limitation of actions]. But this section does not alter the effect of a payment of principle or interest" [to start the time running anew, by way of acknowledgment]. Code C. P., § 395.

CHAPTER XXVIII.

SEPARABILITY.

§ 744. —Where, in a trust instrument, among provisions valid by themselves, there are also provisions which are invalid, it does not necessarily follow that the whole scheme is thereby vitiated. For a distinction is to be observed between schemes which constitute a single entity and must stand or fall on their merits as one whole, and those which may be separated into independent dispositions. If a provision of the former character involves an unlawful disposition, the whole scheme falls to the ground. *Amory* v. *Lord*, 9 N. Y. 403 (413, 418–419) ; *Levy* v. *Levy*, 33 N. Y. 97 (which compare with *Adams* v. *Perry*, 43 N. Y. 487) ; *Haynes* v. *Sherman*, 117 N. Y. 433 ; *Knox* v. *Jones*, 47 N. Y. 389 (398 *et seq.*) ; *Harris* v. *Clark*, 7 N. Y. 242 ; *Dana* v. *Murray*, 122 N. Y. 604 (see *Woodruff* v. *Cook*, 61 N. Y. 638, 641 *et seq.*) ; *Jennings* v. *Jennings*, 7 N. Y. 547 ; *Clemens* v. *Clemens*, 60 Barb. R. 366 ; *Tilden* v. *Green*, 130 N. Y. 29 (50 *et seq.*) ; *Colton* v. *Fox*, 67 N. Y. 348 (352) ; *Rice* v. *Barrett*, 102 N. Y. 161 ; *Matter of Butterfield*, 133 N. Y. 473 ; *Richards* v. *Moore*, 5 Redf. 278 ; *McSorley* v. *Wilson*, 4 Sandf. Ch. 515 (525) ; *Field* v. *Field's Ex'rs*, 4 Sandf. Ch. 528 (551) ; while if the taint of illegality attaches only to an independent and separable part of an entire scheme, this tainted part may be cut off, and the rest allowed to stand. *Matter of Hoyt*, 32 N. Y. State Rep. 787 ; *Palms* v. *Palms*, 68 Mich. 355 ; *Kennedy* v. *Hoy*, 105 N. Y. 134 ; *Ward* v. *Ward*, 105 N. Y. 68 (76) ; (where the trust for the first life was held valid, but the trust to continue during the longer of two further lives was held void, together with the ultimate remainder) ; *Roberts* v. *Cary*, 84 Hun, 328 (336) ; *Murray* v. *Charlick*, 23 Weekly Dig. 563 ; *Kilpatrick* v. *Johnson*, 15 N. Y. 322 ; *Haxtun* v. *Corse*, 2 Barb. Ch. 506 (519) ; *Jansen* v. *Cairnes*, 3 Barb. Ch. 350 (356–357) ; *Greer* v. *Chester*,

62 Hun, 329, aff'd 131 N. Y. 629 ; *Hull* v. *Hull*, 24 N. Y. 647 (653) ; *Phelps' Ex'r* v. *Pond*, 23 N. Y. 69 (80) ; *Matter of Ullman*, 137 N. Y. 403 (405) ; *Tucker* v. *Tucker*, 5 N. Y. 408 ; *Irving* v. *DeKay*, 9 Pai. Ch. 521 (527–528) ; *DeKay* v. *Irving*, 5 Den. 646 (654) ; *Van Vechten* v. *Van Veghten*, 8 Pai. Ch. 104, aff'd 1 Sandf. Ch. 395 ; *Richards* v. *Moore*, 5 Redf. 278 ; *Parks* v. *Parks*, 9 Pai. Ch. 107 (117), aff'd N. Y. Comm. Adv. Jan. 3, 1843 ; *Hone's Ex'rs* v. *Van Schaick*, 20 Wend. 564 (568–569) ; *Sloan* v. *Birdsall*, 58 Hun, 317 (321) ; *Fellows* v. *Heermans*, 4 Lans. 230 (236) ; *Brown* v. *Richter*, 76 Hun, 469, aff'd 144 N. Y. 706 ; *Rogers* v. *Ludlow*, 3 Sandf. Ch. 104 (107–108) ; *Hagerty* v. *Hagerty*, 9 Hun, 175 ; *Robison* v. *Robison*, 5 Lans. 165 (168) ; see also *Curtis* v. *Leavitt*, 15 N. Y. 9 (124) ; *Rome Exchange Bank* v. *Eames*, 4 Abb. Ct. App. Dec. 83 (95) ; and compare Bishop on Insolvent Debtors, 3d ed., § 206.

If a trust is created to receive rents and apply a portion of them to the use of beneficiaries for a legal term, and accumulate the balance, and this latter direction is void, it does not follow that the trust to receive and apply is vitiated. The trust ranges over the entire corpus, and the rents and profits undisposed of pass to those entitled under the rules of the common law (*ante*, § 556) or to those presumptively entitled to the next eventual estate (*ante*, §§ 477,489), as the case may be. *Cochrane* v. *Schell*, 140 N. Y. 516 (536) and cases there cited. The theory of the general principle above stated is, that the statute relating to accumulation, Real Prop. L., § 51, provides that " all *directions* for the accumulation of the rents and profits of real property, except such as are allowed by statute, shall be void." " It makes the *direction* void. It does not avoid the instrument containing the unlawful direction. . . . But limitations of the estate, not depending upon the unlawful accumulations, are unaffected." *Cochrane* v. *Schell*, 140 N. Y. 516 (536) ; *Kilpatrick* v. *Johnson*, 15 N. Y. 322. But the rule may be otherwise " where the valid purpose is nominal merely, and it can be seen that it was inserted as a mere cover for an attempted illegal accumulation." *Id.* And the same principle applies where there is a direct legacy for life, coupled with a void direction to accumulate part of the income, and add it to the principal for the benefit of the remainderman.

While this *direction* is invalid, the legacy is valid, and the income so far as undisposed of passes to those entitled under either the common law or the statute, see *supra*, this section. *Kilpatrick* v. *Johnson*, 15 N. Y. 322. So also, in such a case, the legacy in remainder, though given as a lump sum to consist of the original corpus and of the illegal accumulations, is valid so far as concerns the corpus. *Matter of Hoyt*, 11 N. Y. Supp. 901.

In trusts of personal estate, or of money, which is indefinitely divisible in its nature, a suspension of the absolute ownership as to one part of the fund, for a longer period than is allowed by law, will not make void the disposition which has been made of another part thereof. *Van Vechten* v. *Van Veghten*, 8 Pai. 104 (128), aff'd 1 Sandf. Ch. 395 ; see *Smith* v. *Edwards*, 88 N. Y. 92 (104), and *Holmes* v. *Mead*, 52 N. Y. 332 (338).

Even where, among several provisions, some are valid, and others are invalid, the whole scheme may be vitiated, even although the illegal provisions are distinctly and easily separable from the others. This would be the case where the result of discarding the invalid and sustaining the valid would be to seriously interfere with the obvious intention of the testator as to the equal enjoyment of the beneficiaries, a proportion which could be sustained by considering the entire scheme void as to all, and thus allowing all to take equally (as heirs or next of kin). *Benedict* v. *Webb*, 98 N. Y. 460 (466) ; *Holmes* v. *Mead*, 52 N. Y. 332 (344 *et seq.*) ; *Clemens* v. *Clemens*, 60 Barb. R. 366 ; *Chipman* v. *Montgomery*, 63 N. Y. 221 (234) ; *Field* v. *Field's Ex'rs*, 4 Sandf. Ch. 528 (551) ; *McSorley* v. *Wilson*, 4 Sandf. Ch. 515 (525). But if he directs that invalid provisions shall be stricken out without affecting the validity of the rest, this particular reason fails. *Onderdonk* v. *Onderdonk*, 127 N. Y. 196 (206).

But where the testator's main scheme is valid, it will not be destroyed by the presence of provisions which attempt an illegal result, if these provisions are separable and not essential to the proper harmony and proportion of the whole ; for then they may be cut off. *Manice* v. *Manice*, 43 N. Y. 303 (383) ; *Harrison* v. *Harrison*, 36 N. Y. 543 ; *Tiers* v. *Tiers*, 98 N. Y. 568 (573) ; *Savage* v. *Burnham*, 17 N. Y. 561 (572) ; *Van Schuyver* v. *Mulford*, 59 N. Y. 426 ; *Henderson* v. *Henderson*, 113

N. Y. 1 (15); *Adams* v. *Perry*, 43 N. Y. 487 (500 *et seq.*, which compare with *Levy* v. *Levy*, 33 N. Y. 97); *Woodgate* v. *Fleet*, 64 N. Y. 566 (573); *Culross* v. *Gibbons*, 130 N. Y. 447 (452); *Underwood* v. *Curtis*, 127 N. Y. 523 (541–542); *Barker* v. *Crosby*, 32 Barb. R. 184; *Burns* v. *Allen*, 89 Hun, 552. But where the main elements of a general scheme fail, through invalidity, the subsidiary and dependent elements, even though *per se* valid, fail too. *Holmes* v. *Mead*, 52 N. Y. 332 (344 *et seq.*); *Harris* v. *Clark*, 7 N. Y. 242; *Matter of Butterfield*, 133 N. Y. 473 (476).

The fact that valid and void limitations are both embraced within the terms of a single trust, does not constitute any insuperable obstacle in the way of cutting off the latter and sustaining the former. *Harrison* v. *Harrison*, 36 N. Y. 543; *Manice* v. *Manice*, 43 N. Y. 303 (363); *Savage* v. *Burnham*, 17 N. Y. 561 (576); *Post* v. *Hover*, 33 N. Y. 593; *Darling* v. *Rogers* (Opinion of Cowen, J.), 22 Wend. 483; *Dupre* v. *Thompson*, 4 Barb. R. 280 (284), aff'd 8 Barb. R. 537; *Bolton* v. *Jacks*, 6 Robt. 166. And in all cases where an invalid provision is separable, and is not an essential feature of an entire scheme, it may be cut off without destroying the general design.[1] The cases of *Coster* v. *Lorillard*, 14 Wend. 265; *Hawley* v. *James*, 16 Wend. 60; and *Root* v. *Stuyvesant*, 18 Wend. 257, are said in a later case, *Kane* v. *Gott*, 24 Wend. 641 (666) (see the opinion of Cowen, J., in *Darling* v. *Rogers*, 22 Wend. 483), not to hold a contrary doctrine, though in them the rule was not liberally applied.

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[1] *Underwood* v. *Curtis*, 127 N. Y. 523 (542); *Woodgate* v. *Fleet*, 64 N. Y. 566 (573); *Oxley* v. *Lane*, 35 N. Y. 340 (349 *et seq.*); *De Peyster* v. *Clendining*, 8 Pai Ch. 295, aff'd 26 Wend. 21; *Savage* v. *Burnham*, 17 N. Y. 561 (572 *et seq.*, 576 *et seq.*); *Purdy* v. *Hayt*, 92 N. Y. 446 (458); *Van Schuyver* v. *Mulford*, 59 N. Y. 426; *Tiers* v. *Tiers*, 98 N. Y. 568 (573); *Schettler* v. *Smith*, 41 N. Y. 328 (335 *et seq.*); *Grout* v. *Van Schoonhoven*, 1 Sandf. Ch. 336 (340); *Harrison* v. *Harrison*, 36 N. Y. 543 (547 *et seq.*); *Kennedy* v. *Hoy*, 105 N. Y. 134 (137–138); *Matter of Herrick*, 32 N. Y. State Rep. 1032 (1036), aff'd 14 Supp. 947. The following cases may also be consulted: *Darling* v. *Rogers*, 22 Wend. 483; *Arnold* v. *Gilbert*, 5 Barb. R. 190; *Dupre* v. *Thompson*, 4 Barb. R. 280 (284), aff'd 8 Barb. R. 537; *James* v. *Beasley*, 14 Hun, 520; *Williams* v. *Conrad*, 30 Barb. R. 524; *Killam* v. *Allen*, 52 Barb. R. 605; *Bean* v. *Bowen*, 47 How. Pr. 306 (328).

And where an estate is vested in a trustee upon several independent and separable trusts, some of which are legal, while others are in contravention of the statutes, the estate of the trustee will be upheld to the extent necessary to enable him to execute the valid trusts. *Van Schuyver* v. *Mulford*, 59 N. Y. 426 (432); *Adams* v. *Perry*, 43 N. Y. 487 (500); *Savage* v. *Burnham*, 17 N. Y. 561 (570 *et seq.*); *Woodgate* v. *Fleet*, 44 N. Y. 1, and see cases cited, *supra*. The statutory provision that "where an express trust is created for any purpose not specified in the preceding sections, no estate shall vest in the trustees," Real Prop. L., § 79; *Woodgate* v. *Fleet*, 44 N. Y. 1 (17, and note, p. 20), does not mean that if a separable portion of the trust is invalid no estate shall vest in the trustees as to the other portions. Compare *Greene* v. *Greene*, 125 N. Y. 506. In determining, in any given case, whether an invalid provision is or is not independent and separable, importance may sometimes be attached to the fact that it stands by itself in a separate paragraph, *Kennedy* v. *Hoy*, 105 N. Y. 134 (137, 138); *McCready* v. *Metropolitan Life Ins. Co.*, 83 Hun, 526, aff'd 148 N. Y. 761, but such an arrangement is, nevertheless, quite consistent with the existence of one general scheme, all the parts of which are interdependent, and must stand or fall together. *Holmes* v. *Mead*, 52 N. Y. 332 (345).

Where a trust is ineffective as such, because merely passive, the gift takes effect as a direct devise to the beneficiaries. *Woodgate* v. *Fleet*, 64 N. Y. 566 (573), and see, also, *Doubleday* v. *Newton*, 27 Barb. R. 431. But not if the result would be to transform a devise which was distant and contingent into one which would be immediate and direct, or to subvert the essential purpose of the testator. *Post* v. *Hover*, 33 N. Y. 593 (597). See also *Killam* v. *Allen*, 52 Barb. R. 605; *Morgan* v. *Masterton*, 4 Sandf. R. 442 (449).

There are several distinct classes of cases involving alternative dispositions, which illustrate these same principles. They will be found somewhat fully discussed, in Chaplin on Susp. Pow. Aliena., §§ 483–499, and the cases there cited.

The foregoing principles all apply as well to powers as to trusts, and to cases where both powers and trusts are created together. Many of the cases cited above relate to powers. In par-

ticular, it has been held that the fact that trusts created by a will are invalid, and that a power given is to be exercised in connection therewith and falls with them, does not destroy the validity of the power in other respects covered by it which are distinct and in no way concerned with the fate of the trusts ; *McCready* v. *Metropolitan Life Ins. Co.*, 83 Hun, 526, aff'd 148 N. Y. 761 ; *Lindo* v. *Murray*, 91 Hun, 335 ; as, a power to sell for the benefit of the trust, if deemed best (and so far discretionary, and also invalid through the invalidity of the trust) ; and an imperative power to sell to pay debts, which would remain valid. And this is so though the power for both purposes is granted in the same clause and by the same words, in general terms referring to neither purpose specifically. *Matter of Gantert*, 136 N. Y. 106 (109). So where a power is created for two alternative purposes, one of which is valid and one invalid, it is good as to the former, as, a trust either to sell, *or* to lease for an illegal term. *Van Vechten* v. *Van Veghten*, 8 Pai. Ch. 104 (121–122), aff'd 1 Sandf. Ch. 395. And where a power to manage property is created for several beneficiaries, and a part of them are unable to benefit, the power may be maintained as to the whole property, for the benefit of the beneficiaries not incapacitated, and for the heirs, and a similar result may follow where the trust is to sell, for the benefit of several, some of whom cannot legally take the proceeds. The power may nevertheless range over the entire property. *Downing* v. *Marshall*, 4 Abb. Ct. App. Dec. 662, modifying s. c. 1 Abb. Ct. Ap. Dec. 525. So the invalidity of a power wholly distinct from other dispositions does not invalidate the latter. *Martin* v. *Pine*, 79 Hun, 426 (432). But if the power is inseparably connected with other provisions which are invalid, it is thereby destroyed. *Benedict* v. *Webb*, 98 N. Y. 460. For further illustrations, see *ante*, § 656.

CHAPTER XXIX.

CONFLICT OF LAWS.[1]

(1) *Real Property.*

§ 745.—The validity of a testamentary disposition of real property depends on the law of the place where the land lies. *Lee* v. *Tower*, 124 N. Y. 370.[2]

(*a*) A resident of Connecticut devised lands in New York to trustees, with contingent remainders to four unincorporated associations. These remainders were held void as contravening the law of New York. *White* v. *Howard*, 46 N. Y. 144. For a discussion of the general principles involved, see *Shields* v. *Klopf*, 70 Wis. 69. The same principle applies to limitations

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[1] See Professor Dicey's new "Digest of the Law of England, with Reference to the Conflict of Laws," with notes of American Cases, by John Bassett Moore; and a very interesting and able review thereof by Professor Beale, in 10 Harv. L. Rev. 168, from which the following quotations from Professor Dicey are taken:

"'The courts, *e.g.*, of England, never in strictness enforce foreign law; when they are said to do so, they enforce, not foreign laws, but rights acquired under foreign laws. . . . The rules as to extra-territorial effect of law enforced by our courts are part of the law of England' [pp. 10, 11]. He had already said, still more forcibly [1 Law Quart. Rev. 284], 'The rules of so-called private international law are based on the recognition of actually acquired rights, *i.e.*, of rights which when acquired could be really enforced by the sovereign of the State where they have their origin.'"

[2] If a New York testator devises land situated in other jurisdictions, upon trusts valid there though invalid here, the presence of a discretionary power of sale in the trustees, not effecting conversion, does not subject the validity of the trusts to the laws of New York, even though it be exercised and the proceeds reinvested here. The proceeds are still real estate so far as concerns the validity of the trusts. *Butler* v. *Green*, 65 Hun, 99. And a corresponding rule applies where testator lived in another State and the devise of his lands in New York, subject to a power, is invalid there but valid here. *Bloomer* v. *Bloomer*, 2 Bradf. 339.

affecting land in New York purchased by the trustees under the provisions of the will. (Same citations.)

(*b*) The same testator devised an alternative contingent remainder to the treasurer of one of said societies, in case the society was unable to take. The beneficiaries were not ascertainable. This was also held void on the same ground. *White* v. *Howard*, 46 N. Y. 144 (162–163).

(*c*) The same testator devised land in New York to a society incorporated in Maryland, which had never been authorized by the State of New York to hold land in New York. Such authority is essential. The devise was held void on the same ground.

(*d*) A resident of New York devised land in California to trustees. It was held that the validity of the trust depended on the laws of California. *Knox* v. *Jones*, 47 N. Y. 389; compare *Hawley* v. *James*, 7 Pai. Ch. 213.

(*e*) A resident of Massachusetts devised a future estate in land in New York to vest, at the end of twelve lives, in devisees not ascertainable until that time. The devise was held void, as contravening the law of New York, though it would have been valid if judged by the laws of Massachusetts. *Hobson* v. *Hale*, 95 N. Y. 588.

(*f*) A resident of State A by his will effects a double conversion, at his death, of lands in State B, first into money and then into lands in State C. The property is regarded as at once converted into lands in State C, and the validity of the testamentary provision is to be determined in State C, and by its laws. *Ford* v. *Ford*, 80 Mich. 42. See also *Trowbridge* v. *Metcalf*, 5 App. Div. 318.

(2) *Personal Property.*

§ 746.—The validity of a testamentary disposition of personal property depends on the following principles:

§ 747. **General principle.**—As a general proposition our statutes affecting the validity of testamentary dispositions of personal property, find their chief application in the case of domestic wills that by their provisions are to be executed here. In such cases their validity depends on the law of New York. *Dammert* v. *Osborn*, 140 N. Y. 30 (41), 141 N. Y. 564.

§ 748. **Action here to annul.**—In cases not answering this description, when the aid of the court here is sought, not for the purpose of giving actual assistance in the administration of the trust, but in order to annul the trusts, it will decline to interfere, though in some cases it may remit the property to the foreign jurisdiction, *Dammert* v. *Osborn*, 140 N. Y. 30 (46); 141 N. Y. 564. See *post*, § 749.[1] Thus:

(*a*) A, domiciled in Rhode Island, by will appointed a New York Trust Company trustee of personal property under a trust valid in Rhode Island, but invalid if tested by the laws of New York. Action was brought in New York to annul the trust. The court refused to interfere. *Cross* v. *U. S. Trust Co.*, 131 N. Y. 330.

(*b*) A testator, domiciled in New York, by will bequeathed personal property to trustees in Scotland, upon a trust valid there, but invalid if tested by the laws of New York. Action was brought to determine the validity of the disposition. The court refused to interfere. *Hope* v. *Brewer*, 136 N. Y. 126.

(*c*) A testator domiciled in New York, bequeathed $5000 to Yale College, which was authorized by the laws of Connecticut to receive the bequest. It was accompanied with certain "requests," viz.: To accumulate the interest until the aggregate fund should reach $30,000, and to apply the interest continuously to educate one person who should bear testator's paternal name, and be a lineal descendant of testator. It was held that the validity of these *requests* must be determined by the laws of Connecticut. *Manice* v. *Manice*, 43 N. Y. 303 (387–388). As to this case, see *Cross* v. *U. S. Trust Co.*, 131 N. Y. 330 (346).

(*d*) A testator domiciled in New York bequeathed property to

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[1] It appears, however, that a trustee appointed in another State, by one domiciled there, of personal property physically located here, may, if present in this State, be required to account, *Townsend* v. *Allen*, 13 N. Y. Supp. 73, aff'd 126 N. Y. 646; and may here be removed and a successor appointed, *Jones* v. *Jones*, 8 Misc. 660.

For a case where, in a contest arising over the construction of a trust of personalty created by a foreign will, and to be determined according to the rules of the foreign law, the court here took cognizance of the matter, see *Simonson* v. *Waller*, 9 App. Div. 503, reversing, but not on this point, s. c. 14 Misc. 95. The claimants were residents of New York, the property itself was here, and all parties claiming to be entitled were before the court.

the Centenary Fund Society, a corporation chartered under the laws of Pennsylvania. On questions arising out of the charitable nature of the corporation, the court were asked to hold that the validity of the gift for such purposes must be determined by the laws of New York. This the court declined to do. *Chamberlain* v. *Chamberlain*, 43 N. Y. 424.

(*e*) A testator domiciled in New York bequeathed personal property to a trustee, to invest in Ohio. His wife and children also resided in New York. The residence of the trustee does not clearly appear from the report. From the report, however, of another proceeding arising out of the same will (see *Wood* v. *Wood*, 4 Pai. Ch. 299) it appears that this trustee was in fact a resident of New York at testator's death. The provisions of the will would be illegal under the laws of New York, both for undue suspension and for other reasons. The opinion of the court was that the validity of the provisions must be determined by the laws of New York. *Wood* v. *Wood*, 5 Pai. Ch. 596. The authority of this case was discredited in *Chamberlain* v. *Chamberlain*, 43 N. Y. 424, where it was said that it was "peculiar in its circumstances, and can, in view of the final disposition of it by the chancellor [a postponement of final decree, and recommendation to compromise] scarcely be regarded as a precedent."

(*f*) In *Phelps' Ex'r* v. *Pond*, 23 N. Y. 69 (77), the bequest was by a New York testator *to his executors*, for the purpose of establishing a college in Liberia. Here the validity of the provisions was held to depend on the laws of New York.

(*g*) In *Bascom* v. *Albertson*, 34 N. Y. 584, a testator, domiciled in New York, bequeathed property to persons to be appointed after his death by the Supreme Court of Vermont, to found an educational institution. It was held that as these provisions were void under the laws of New York, they could not be sustained. But the Court of Appeals, referring, in *Hope* v. *Brewer*, 136 N. Y., p. 143, to *Bascom* v. *Albertson*, say: "The testator failed to appoint trustees competent to take, and it did not appear that those appointed by the action of the judges of the Supreme Court of Vermont could take or hold, or that the trust could be administered under the laws of that State. Besides, the views expressed in the prevailing opinion, in so far as they are in conflict with the judgment now under review, must

be deemed to be modified by the subsequent cases of *Chamberlain* v. *Chamberlain* [43 N. Y. 424], *Manice* v. *Manice* [43 N. Y. 303], and *Despard* v. *Churchill* [53 N. Y. 192]." See also *Holland* v. *Alcock*, 108 N. Y. 312 (337).

§ 749. **Action for active assistance.**—If, however, in such cases, a plaintiff seeks the aid of the court in enforcing or administering the trust, the objection to this relief might, under ordinary circumstances, be formidable. *Dammert* v. *Osborn*, 140 N. Y. 30 (41). Thus, in *Despard* v. *Churchill*, 53 N. Y. 192, a testator domiciled in California bequeathed certain personal property situated in New York by provisions invalid under the New York law relating to perpetuities. On a suit here for construction of the will, it was held that "as this sovereignty will not uphold a devise or a bequest by one of its citizens in contravention of that policy (concerning suspension), it will not give its *direct aid* to sustain, enforce or administer here such a devise or bequest made by a citizen of another sovereignty. Yet it is no part of the policy of this State to interdict perpetuities or accumulations in another State." "As has been stated, the courts of this State may not directly aid in carrying out here a bequest which is in violation of its statute law, and contrary to a policy of which it is tenacious. *And yet they may not hold the bequest void* when it is valid by the law of the State by which the disposition of the property is to be governed. The one would be to transgress the written law of this State; the other would be to disregard an unwritten rule of law, well settled, and of extensive and frequent application." "The assets here should be remitted to the State of California, to be distributed in accordance with the law there." See *ante*, § 748, first paragraph. As to this case see *Cross* v. *U. S. Trust Co.*, 131 N. Y. 330 (346). In *Dammert* v. *Osborn*, 140 N. Y. 30, José Sevilla, the testator, was domiciled in Peru. By his will, he bequeathed $500,000 in certain securities, a considerable portion of which, or the evidences thereof, were, at his death, in New York, for the founding and maintenance of a Home for Poor Children, in New York City. The plaintiffs, as executors, had possession of the securities, and asked the judgment of the court as to their disposition. The defendants who appeared, were the

trustees duly appointed as directed by the will, a corporation chartered by the New York Legislature to establish and manage the Home, and the Sociedad de Beneficiencia de Lima which claimed in hostility to this bequest. It was conceded by the court, for the purpose of the appeal, that if judged by the laws of New York in force at testator's death, there was no trustee competent to take, that the estate was not, by the terms of the will, certain to vest within lives in being, and that the nature of the trust would be too indefinite. Referring to the formidable objection generally existing to the active assistance of our courts in the enforcement here of such a trust, the court hold that that difficulty had there been obviated by the terms of the statute incorporating The Sevilla Home, which in effect provides that it may receive and hold the property in spite of any indefiniteness in the nature of the trust, or of the lack of appointment of a competent trustee, or of the undue suspension of ownership ; that the Legislature could not, if the property had already vested elsewhere by the law of testator's domicil, divest it and vest it in others, but that under the laws of Peru it had not vested in others, and that in such a case, the Legislature may obviate any objection to an active participation by the courts in directing the turning over of the funds directly to the purposes of the trust, by new legislation.

§ 750. **Public policy.**—In cases where no active assistance of any kind is sought from the court here, in the enforcement or administration of trusts involving the features under consideration, it seems that the question of public policy, as the laws now stand, is not necessarily involved, where the only invalidity alleged relates to the term of the trust, the indefiniteness of the beneficiaries, the statute invalidating certain gifts to corporations unless made more than two months before death, etc. *Hope* v. *Brewer*, 136 N. Y. 126 (129) ; *Dammert* v. *Osborn*, 140 N. Y. 30 (40–41) ; *Cross* v. *U. S. Trust Co.*, 131 N. Y. 330 (341, 345) ; *Hollis* v. *Drew Theo. Sem.*, 95 N. Y. 166. But when the active assistance of the court is thus sought, a different question is raised. But even in that case, what that policy is, is to be determined by the situation existing at the time when the court is required to make its decree disposing of the fund. Thus

statutes then in force, however recent, are to be considered in determining the public policy, subject of course to the principle that if rights are once vested they cannot be divested by subsequent legislation. *Dammert* v. *Osborn*, 140 N. Y. 30 (44). See *post*, § 761. In the case cited, this principle was applied both to the special act of the Legislature relating to the case before the court, and to L. 1893, ch. 701 (not repealed, but, so far as concerns real property, replaced by Real Prop. L., § 93) which provides that the indefiniteness or uncertainty of the beneficiaries shall not by itself render void a disposition of property, for charitable uses, otherwise valid.

If, according to the public policy of a State, a given corporation is incapable of receiving property, except under certain conditions, a disposition of property in its favor by a person domiciled elsewhere, and not complying with those conditions, would fail. Neither the will, nor the law of testator's domicil, could confer power to take upon a corporation of another State. *Cross* v. *U. S. Trust Co.*, 131 N.Y. 330 (346). But if the corporation or other legatee is capable of taking at its own domicil, the fact that it would have no capacity to take if our local system were the test, does not invalidate a bequest to it by one domiciled in New York, *Matter of Huss*, 126 N. Y. 537. Some of the earlier authorities on the general subject of this chapter have been qualified in later cases. Thus, compare *Draper* v. *Harvard College*, 57 How. Pr. 269 ; *Kennedy* v. *Town of Palmer*, 1 T. & C. 581 ; *Mapes* v. *American Home Missionary Soc'y*, 33 Hun, 360 ; with *Cross* v. *U. S. Trust Co.*, 131 N. Y. 330 (347). Also compare *White* v. *Howard*, 46 N. Y. 144 ; *Matter of Hughes*, 95 N. Y. 55 ; *Hobson* v. *Hale*, 95 N. Y. 588 ; *Bascom* v. *Albertson*, 34 N. Y. 584 ; with *Cross* v. *U. S. Trust Co.*, 131 N. Y. 330 (348). Also compare *Bascom* v. *Albertson*, 34 N. Y. 584, with *Hope* v. *Brewer*, 136 N. Y. 126 (142–143). Further decisions illustrating the foregoing principles are *Levy* v. *Levy*, 33 N. Y. 97 (136–137) ; *Hull* v. *Mitcheson*, 64 N. Y. 639 ; *Slatter* v. *Carroll*, 2 Sandf. Ch. 573 ; *Bonilla* v. *Mestre*, 34 Hun, 551 ; *Butler* v. *Green*, 65 Hun, 99.

CHAPTER XXX.

CONSTRUCTION.

(1) *Jurisdiction of the Supreme Court.*

§ 751.—The jurisdiction of the Supreme Court over an action for the construction of a will arises from its inherent power over trusts, and to some extent, from § 1866 of the Code, which will be considered later.

§ 752. **(a) Inherent jurisdiction.**—The subject of trusts is peculiarly a matter of equity jurisdiction, which is very comprehensive where the other tribunals cannot afford relief, and the lack of it is not to be inferred from the novelty of the questions presented. *N. T. Bank* v. *Wetmore*, 124 N. Y. 241 (250). But even a court of equity with general jurisdiction over equitable subjects has no inherent jurisdiction of an action merely because it seeks the construction of a will. Its power, in that field, is based upon, and is incident to, its jurisdiction over trusts. *Washbon* v. *Cope*, 144 N. Y. 287 (295); *Chipman* v. *Montgomery*, 63 N. Y. 221 (230); *Walrath* v. *Handy*, 24 How. Pr. 353; *Weed* v. *Weed*, 94 N. Y. 243; *Bailey* v. *Briggs*, 56 N. Y. 407; *Post* v. *Hover*, 33 N. Y. 593 (602); *Woodruff* v. *Cook*, 47 Barb. R. 304; *Bowers* v. *Smith*, 10 Pai. Ch. 193; *Onderdonk* v. *Mott*, 34 Barb. R. 106; *Wager* v. *Wager*, 89 N. Y. 161; *Horton* v. *Cantwell*, 108 N. Y. 255 (267); *Monarque* v. *Monarque*, 80 N. Y. 320 (325). And "the validity of a mere power of sale given to executors, is a question for a court of law as distinguished from a court of equity. It is a question primarily of legal and not of equitable cognizance. There is no inherent power vested in courts of equity in the construction of devises, as a distinct and independent branch of jurisdiction, but they exercise this jurisdiction only as incident to their jurisdic-

tion over trusts. *Bowers* v. *Smith*, 10 Pai. Ch. 193 ; *Monarque* v. *Monarque*, 80 N. Y. 320 ; *Wager* v. *Wager*, 89 N. Y. 161. The validity of devises and limitations in wills, or of a power conferred thereby, depends upon and is determinable by legal rules, and their determination must ordinarily await an occasion when, in a legal action or proceeding, a right under the devise or limitation, or the execution of the power, is asserted by one party, or denied by the other. The will in question in this case created legal estates only in the land devised, unaccompanied by any trust. The power of sale given to the executor, while it was in a sense a trust power, did not create any trust in the land devised, and while it might warrant the executor, upon a question arising, to apply to the court for instructions, the mere fact of the existence of the power did not make a case for invoking in behalf of a devisee, or the grantee of a devisee, the equitable jurisdiction of the court in the construction of wills, within the principles established in this State.'' *Mellen* v. *Mellen*, 139 N. Y. 210 (218). And it seems that, even when there is a trust involved, yet if complete relief can be obtained in a Surrogate's Court, a court of equity, while it has jurisdiction, may in its discretion decline to entertain an action for relief against executors (or testamentary trustees), *Wager* v. *Wager*, 89 N. Y. 161 (168). And while a trustee may in a proper case bring an action for construction of a will, yet, if a proceeding involving the same points has already been begun by proper parties before a surrogate having jurisdiction to decide them, such an action in the Supreme Court is improper and will not be sustained, and this, even though the matter had been heard before a surrogate's referee who had determined that the surrogate had no jurisdiction, but the surrogate had not yet passed on the referee's report, and did in reality have jurisdiction. See *Garlock* v. *Vandevort*, 128 N. Y. 374. The court will not pass on the validity of a trust, of its own motion, or on application of a party, merely because it appears in an instrument before it for construction, unless the question presented for decision turns on the validity or invalidity of the trust. *Matter of Gantert*, 136 N. Y. 106 (112–113) ; *Oxley* v. *Lane*, 35 N. Y. 340 (344) ; *Cochrane* v. *Schell*, 140 N. Y. 516 (526). But jurisdiction does not depend on which way the question (*e. g.*, as to a trust) may be decided, but on the

existence of the question. *Greyston* v. *Clark*, 41 Hun, 125. The principle that the inherent jurisdiction of equity over suits for the construction of testamentary dispositions rests solely on the existence of a trust, finds its corollary in the principle that the action can be brought by the executor, the trustee or the beneficiary only. But as to this, see *post*, § 753.

This is true whether the disposition in question relates to real or to personal property (except that even an executor may not bring such an action relating to real property, unless he is charged with a trust affecting it). *Dill* v. *Wisner*, 88 N. Y. 153 ; *Anderson* v. *Anderson*, 112 N. Y. 104 (110) ; *Dill* v. *Wisner*, 88 N. Y. 153 ; *Bailey* v. *Briggs*, 56 N. Y. 407 ; *Post* v. *Hover*, 33 N. Y. 593 (602) ; *Weed* v. *Weed*, 94 N. Y. 243 ; *Read* v. *Williams*, 125 N. Y. 560 ; *Duncan* v. *Duncan*, 4 Abb. N. C. 275. But the application of the principle to the two classes of property reveals this distinction. If the property is real, the heir (apart from Code C. P., § 1866, discussed *post*, § 753) cannot, as such, seek this relief. If he is a trust beneficiary, he may, as beneficiary, seek for a construction supporting the trust. But in his capacity as heir he cannot ask for a construction, for such a course must be based on the theory that there is no trust, and so no jurisdiction. He cannot assert a trust in order to establish jurisdiction, and also deny it in order to acquire the property. *Chipman* v. *Montgomery*, 63 N. Y. 221 ; *Graham* v. *Read*, 57 N. Y. 681 ; *Rome Exchange Bank* v. *Eames*, 4 Abb. Ct. App. Dec. 83 (88). But if the property is personal, the next of kin may bring an action for construction. It is true that in such case they claim in hostility to the will, but the theory of the action is that the disposition attempted by the testator is invalid, and that therefore the executor holds the personal property upon a resulting trust for those entitled under the statute of distribution. And this alleged trust serves as a basis for equitable jurisdiction. *Read* v. *Williams*, 125 N. Y. 560 (566) ; *Wager* v. *Wager*, 89 N. Y. 161 ; *Holland* v. *Alcock*, 108 N. Y. 312 ; *Bowers* v. *Smith*, 10 Pai. Ch. 193 (200) ; *Keteltas* v. *Keteltas*, 53 How. Pr. 65 ; *Keteltas* v. *Keteltas*, 72 N. Y. 112 ; *Duncan* v. *Duncan*, 4 Abb. N. C. 275 (278) ; *Simmons* v. *Burrell*, 8 Misc. 388 (392), appeal dismissed, 83 Hun, 615.

In spite of the limitations already mentioned, yet where equity

acquires jurisdiction of a suit, it thereby acquires incidental jurisdiction to construe a trust instrument and settle the whole controversy. *Wager* v. *Wager*, 89 N. Y. 161 (168).

But even where a suit for construction is properly before a court of equity, the existence of jurisdiction for that purpose does not authorize it to also pass on the question whether the trust fund in question is subject to the transfer tax. Jurisdiction in that field is purely the creation of statute, and has not, as a matter of first instance, been conferred on courts of equity. *Weston* v. *Goodrich*, 86 Hun, 194 ; compare *Catlin* v. *Trustees of Trinity College*, 49 Hun, 278, aff'd 113 N. Y. 133.

The question has been raised whether or not § 1866 of the Code now also authorizes the heirs or devisees to bring a suit for construction of a will. This will now be examined.

§ 753. (b) Under Code, § 1866.—This provision (which is retroactive, Code C. P., § 1867) is as follows :

" The validity, construction or effect, under the laws of the State, of a testamentary disposition of real property situated within the State, or of an interest in such property, which would descend to the heir of an intestate, may be determined, in an action brought for that purpose, in like manner as the validity of a deed, purporting to convey land, may be determined. The judgment in such an action may perpetually enjoin any party, from setting up or from impeaching the devise or otherwise making any claim in contravention to the determination of the court, as justice requires. But this section does not apply to a case, where the question in controversy is determined by the decree of a Surrogate's Court, duly rendered upon allegations for that purpose, as prescribed in article first of title third of chapter eighteenth of this act, where the plaintiff was duly cited, in the special proceeding in the Surrogate's Court, before the commencement of the action."

This section refers not to the will making the disposition, but to the disposition so made. *Anderson* v. *Anderson*, 112 N. Y. 104. In *Mellen* v. *Mellen*, 139 N. Y. 210 (218), the court say, in a dictum, that § 1866 extends the power of the court over actions for construction, and they may now be brought in many cases in which, before the statute, the court would have declined

jurisdiction. What these cases are, they do not specify. In *Adams* v. *Becker*, 47 Hun, 65, it was held that the Code section authorizes an action by an heir, for the construction of a will. But in *Anderson* v. *Anderson*, 112 N. Y. 104, this seems doubted, and is left open. In *Read* v. *Williams*, 125 N. Y. 560 (566), it was said that this section had extended the remedy so as to include suits for the construction of devises in behalf of heirs claiming adversely to the will, but the point was not before the court. Compare *Horton* v. *Cantwell*, 108 N. Y. 255 (264–266). *Ruppel* v. *Schlegel*, 55 Hun, 183, and *Gage* v. *Gage*, 43 Hun, 501, aff'd 112 N. Y. 667, announce the contrary doctrine. In *Whitney* v. *Whitney*, 63 Hun, 59 (71 *et seq.*), the subject receives a thorough discussion, and the court adopt the view that the Legislature did not intend to confer such additional jurisdiction as would authorize the maintenance of a suit in equity for construction of a will, involving no trust and intended to determine the title to real property, when the plaintiff has a full, adequate and immediate remedy by an action at law. Compare *Wallace* v. *Payne*, 9 App. Div. 34.

(2) *Jurisdiction of the Surrogate.*

§ 754.—(*a*) By § 2624 of the Code, the surrogate is empowered, in proceedings for probate of a will of a resident of the State, executed within the State, where the validity, construction or effect of any disposition of personal property is expressly put in issue by a party, to determine the question upon rendering a decree, unless the decree refuses to admit the will to probate. This provision is confined to personal property. But if the will relates only to real, or to both real and personal property, and the disposition of both is inseparably connected. this particular section does not apply. *Matter of Shrader*, 63 Hun, 36 ; *Matter of Merriam*, 136 N. Y. 58 ; *Matter of Morgenstern*, 9 Misc. 198 ; *Matter of Schweigert*, 17 Misc. 186 (193). And under this section the question of construction must be presented in the form of an issue. *Matter of Campbell*, 88 Hun, 374, and must be expressly raised. *Matter of Watson*, 131 N. Y. 587. For a general construction of this section, with special reference to the persons who may take advantage of it, and the cases to which it applies, see *ante*, § 521 ; *Jones* v.

Hamersley, 4 Dem. 427; *McClure* v. *Woolley*, 1 Dem. 574; *Tiers* v. *Tiers*, 2 Dem. 209 (compare *Tiers* v. *Tiers*, 98 N. Y. 568); *Matter of Campbell*, 88 Hun, 374.

(*b*) There are no other statutory provisions which specifically confer on the surrogate, in so many words, the power to construe wills, save in special particular cases, as where the surrogate, and not equity, in the first instance, is empowered to construe a will with reference to the applicability of the Taxable Transfer Act. *Ante*, end of § 752. But the sections of the Code imposing duties, and conferring authority, on the surrogate, involve in many instances an incidental power of construction. Code C. P., § 2481, subd. 11; § 2472 *et seq.*[1] In these cases, though the disposition in question affects real property, the surrogate may still construe it. *Matter of French*, 52 Hun, 303 (307); *Purdy* v. *Hayt*, 92 N. Y. 446; *Baldwin* v. *Smith*, 3 App. Div. 350 (353). But this principle of implied authority is limited in its scope, and applies only where the construction is a necessary incident of powers conferred, *Bevan* v. *Cooper*, 72 N. Y. 317; *Fiester* v. *Shepard*, 92 N. Y. 251; *Sanders* v. *Soutter*, 126 N. Y. 193; *Washbon* v. *Cope*, 144 N. Y. 287 (295); *Matter of McClouth*, 9 Misc. 385; and only to the extent thus required when it is exercised, *Johnson* v. *Lawrence*, 95 N. Y. 154. But when the jurisdiction exists, and no appeal lies, the construction given, although erroneous, protects the trustee in acting accordingly. *Matter of Perkins*, 75 Hun, 129, aff'd 145 N. Y. 599.

(3) *Res Adjudicata.*

§ 755.—For a discussion of the binding effect of decrees construing trust instruments, see *Leavitt* v. *Wolcott*, 95 N. Y. 212; *Pray* v. *Hegeman*, 98 N. Y. 351 (358–362); *Culross* v. *Gib-*

[1] *Matter of Ullman*, 137 N. Y. 403 (408); *In re Verplanck*, 91 N. Y. 439; *Purdy* v. *Hayt*, 92 N. Y. 446; *Riggs* v. *Cragg*, 89 N. Y 479; *Garlock* v. *Vandevort*, 128 N. Y. 374 (378); *Matter of Wagner*, 119 N. Y. 28 (32); *Currin* v. *Fanning*, 13 Hun, 458 (463); *Leggett* v. *Leggett*, 24 Hun, 333 (336); *Matter of Havens*, 8 Misc. 574; *Kelsey* v. *Van Camp*, 3 Dem. 530; *Board of Missions* v. *Scovell*, 3 Dem. 516; *Kelsey* v. *Van Camp*, 3 Dem. 530; *Steinele* v. *Oechsler*, 5 Redf. 312; *Matter of Fernbacher*, 17 Abb. N. C. 339; *Du Bois* v. *Brown*, 1 Dem. 317; *Matter of Soule*, 1 Con. 18; *Giles' Estate*, 11 Abb. N. C. 57 (and note, p. 58); *Matter of Owens*, 33 N. Y. Supp. 422; *Matter of Ryalls*, 80 Hun, 459; *Matter of Metcalfe*, 6 Misc. 524; see note, 28 Abb. N. C. 65.

bons, 130 N. Y. 447 (453–455); *Matter of Livingston*, 34 N. Y. 555. The power of a court to bind the parties only extends to matters within its jurisdiction. *Sweeney* v. *Warren*, 127 N. Y. 426 (435); *Johnson* v. *Lawrence*, 95 N. Y. 154. The decree may contain leave to apply at its foot for further directions. *Youngs* v. *Youngs*, 45 N. Y. 254; 53 N. Y. 613; *Savage* v. *Sherman*, 87 N. Y. 277 (281).

(4) *Principles of Construction.*[1]

§ 756.—Most of the principles governing the construction of instruments creating trusts, are the same as those that apply in general to the construction of wills and deeds. It would, therefore, be inappropriate here to attempt a general review of the law on this subject. But the leading principles which have a special bearing on trusts and powers are stated below.

§ 757. **Intent controls.**—In construing both deeds and wills, and all instruments creating, transferring, assigning, or surrendering, or authorizing the creation, transfer, assignment or surrender of any estate or interest in lands, the *intent*, as gathered from the entire instrument, controls. *Heath* v. *Hewitt*, 127 N. Y. 166 (173); Real Prop. L., § 205. And the *surrounding circumstances* existing when the instrument was executed, its subject-matter, and the situation of the parties, may be considered in reaching the intent. *Heath* v. *Hewitt*, *supra*, p. 174. The situation of the estate at the execution of the will may be shown to indicate testator's intent as to the imperative or discretionary nature of a power of sale. *Scholle* v. *Scholle*, 113 N. Y. 261 (273). Compare Real Prop. L., § 137. These rules apply to both trusts and powers. *Holly* v. *Hirsch*, 135 N. Y. 590 (595); compare *Ramsey* v. *Wandell*, 32 Hun, 482 (485); *Constant* v. *Servoss*, 3 Barb. R. 128.

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[1] It is provided by Stat. Constr. L., § 32, as amended by L. 1894, Ch. 448, that "The provisions of a law repealing a prior law, which are substantial re-enactments of provisions of the prior law, shall be construed as a continuation of such provisions of such prior law, and not as new enactments. If any provision of a law be repealed and, in substance, re-enacted, a reference in any law to such repealed provision shall be deemed a reference to such re-enacted provision." As to the scope of this section see also *id.*, § 1; compare *Matter of Kavanagh*, 125 N. Y. 418.

All parts of a will, including a codicil, are to be *construed together*. *Vernon* v. *Vernon*, 53 N. Y. 351 (358); *Ward* v. *Ward*, 105 N. Y. 68 (73); *Pierpont* v. *Patrick*, 53 N. Y. 591. Void provisions in a will, though ineffectual to dispose of the property, cannot be obliterated so as to withdraw them from consideration in a search for testator's intent in other provisions. *Tilden* v. *Green*, 130 N. Y. 29 (55). But in construing a will it is not necessary to determine the effect of a contingency which has not happened and may not happen at all. *Radley* v. *Kuhn*, 97 N. Y. 26 (33); *Cochrane* v. *Schell*, 140 N. Y. 516 (526). But see *Schettler* v. *Smith*, 41 N. Y. 328 (339, 346 *et seq.*). So with the validity of a contingent power of appointment, under the same circumstances, *Jones* v. *Hamersley*, 4 Dem. 427. An absolute conveyance, and a contemporaneous declaration of trust by the grantee, are to be construed together as one instrument. *Knowlton* v. *Atkins*, 134 N. Y. 313 (316).

Prima facie, the same word employed in different parts of an instrument, is used in the same sense throughout; *Matter of Tienken*, 131 N. Y. 391 (406); *Goebel* v. *Wolf*, 113 N. Y. 405 (414); 2 Jarman on Wills, 842; but this presumption is not necessarily controlling. *U. S. Trust Co.* v. *Black*, 146 N. Y. 1 (13); *Drake* v. *Drake*, 134 N. Y. 220 (228, 229, 231). And a change of phraseology indicates a change of purpose, *Scholle* v. *Scholle*, 113 N. Y. 261 (272); 2 Jarman on Wills, 842; *Mullarky* v. *Sullivan*, 136 N. Y. 227 (231); but is not conclusive. *Moore* v. *Hegeman*, 72 N. Y. 376.

Technical terms are *prima facie* to be read in their technical sense, *Keteltas* v. *Keteltas*, 72 N. Y. 312. The accurate and discriminating use of technical legal terms in one part of a will, has some significance on the question of the technical or loose meaning to be given to the same terms in other parts, but is not controlling. *Lamb* v. *Lamb*, 131 N. Y. 227 (235); *Lawton* v. *Corlies*, 127 N. Y. 100; *Mullarky* v. *Sullivan*, 136 N. Y. 227 (231); *Drake* v. *Drake*, 134 N. Y. 220 (231); *Matter of Tienken*, 131 N. Y. 391 (406). Where a testator uses some words and phrases in an obviously untechnical sense, and makes provision for acts on the part of legatees or executors which indicate an entire unfamiliarity with legal requirements necessary to effect his purpose, less reliance is to be placed, in other clauses, on the

exact terms and forms employed, and greater care is to be used in seeking his intent from the entire will. *Matter of White*, 125 N. Y. 544 (549). Evidence of testator's knowledge of the legal effect of a term, from other clauses of the will, is admissible as bearing on his intent. *Matter of Wells*, 113 N. Y. 396 (402). The fact that the creator of a trust is a lawyer, may be allowed some weight, *e.g.*, in determining whether he knew the scope and capacity of a certain corporation with which he was connected; and as bearing against a construction of the trust which would read into the instrument an intent to give to it, where it could not in fact take under the natural meaning of the words used; and as showing that in using such words he could not have intended such a gift. *Riker* v. *Leo*, 115 N. Y. 93 (100); 133 N. Y. 519. A specific phrase may sometimes be interpreted contrary to its grammatical sense. *Mott* v. *Ackerman*, 92 N. Y. 539 (550–551); *Phillips* v. *Davies*, 92 N. Y. 199. As to effect of *habendum* in trust, see *ante*, pp. 356, 602.

It is the duty of the court to harmonize and retain as far as possible all the provisions of the will; to reject no words of the maker except upon imperative necessity; and to seek for all of them some force and operation. *Crooke* v. *Co. of Kings*, 97 N. Y. 421 (434). But, in case of necessity, the court may punctuate; and add, omit, or substitute words, in order to give effect to the actual intention appearing from the instrument as a whole, as by adding commas, and relative pronouns, *Fraser* v. *Trustees*, 124 N. Y. 479 (486); changing "and" to "or," *Roe* v. *Vingut*, 117 N. Y. 204 (216); *Van Vechten* v. *Pearson*, 5 Pai. Ch. 512; correcting plural into singular, *Roe* v. *Vingut*, 117 N. Y. 204 (216); *Weeks* v. *Cornwell*, 104 N. Y. 325 (340); transposing, inserting, omitting, *Mott* v. *Ackerman*, 92 N. Y. 539 (550–551); *Phillips* v. *Davies*, 92 N. Y. 199; *Wager* v. *Wager*, 96 N. Y. 164 (172); *Starr* v. *Starr*, 132 N. Y. 154 (158); making "except" read "including," *Starr* v. *Starr*, 132 N. Y. 154 (158); "Easterly" read "Westerly," *Brookman* v. *Kurzman*, 94 N. Y. 272; "legatees" read "devisees," *Weeks* v. *Cornwell*, 104 N. Y. 325 (340); "not less" read "not more," *Hubbard* v. *Hubbard*, 18 Misc. 276, etc.[1]

[1] Whether a reference to a "youngest child," "eldest child," etc., relates to the date of testator's death, or to some other period, is a question of in-

§ 758. **Will to be sustained if practicable.**—Where a testator's object is unworthy or commands the just condemnation of the court, it will not strain to support his plan. *Matter of Paton*, 111 N. Y. 480 (486); *Greene* v. *Greene*, 125 N. Y. 506 (512). But apart from this objection, it endeavors to find a way of upholding the will and to effectuate it through some legal channel of construction if any be open. 2 Jarman on Wills, 842; *Greene* v. *Greene*, 125 N. Y. 506 (512); *Locke* v. *F. L. & T. Co.*, 140 N. Y. 135 (149); *Terry* v. *Wiggins*, 47 N. Y. 512 (517); *Duclos* v. *Benner*, 136 N. Y. 560 (568). In aid of a construction which would give validity, testator may be presumed to have known the law and intended that meaning. *Chwatal* v. *Schreiner*, 148 N. Y. 683; *Barnard* v. *Crossman*, 54 Hun, 53 (55). But sometimes the principle is laid down that the court should first determine testator's meaning, and then decide whether that meaning is one to which legal effect may be given. *Colton* v. *Fox*, 67 N. Y. 348 (351).

§ 759. **Intestacy not favored.**—The law favors a construction

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tent. Chaplin, Susp. Pow. Aliena., §§ 97–101. Whether the words "wife," "widow," "husband," refer to a present relationship, or to one that may arise at a future date, etc., is a question of intent. *Id.*, §§ 102–107. As to the meaning of the words "death without heirs," or "without issue," see *Id.*, §§ 500–503; and of a devise, remainder over "in case of death," to "survivors," etc., see *Id.*, §§ 500–503. As to posthumous children, see Real Prop. L., § 46. As to a remainder limited to the "heirs" of a person to whom a life estate in the same premises is given, see Real Prop. L., § 44. The word "children" means, *prima facie*, legitimate children, but may (*e.g.*, where the person referred to as parent is already dead, leaving no legitimate issue, or where other parts of the will make the actual meaning clear) refer to illegitimate children. *Gelston* v. *Shields*, 78 N. Y. 275. So "children" means, *prima facie*, issue of the first degree, but may relate to those of a more remote degree. *Matter of Truslow*, 140 N. Y. 599. *Ante*, § 616. As to the *prima facie* meaning of "descendants," see *ante*, § 616. For a discussion of the force and extent of *particular words* of description of property, see Jarman on Wills, chaps. 22, 23, 24; Hawkins on Wills, chap. 5; Wms. on Ex'rs, 1272 *et seq.*; and terms of description of beneficiaries, Hawkins on Wills, chaps. 8 and 15; Jarman on Wills, chaps. 29, 30, 31; Wms. on Ex'rs, 1089 *et seq.* For a discussion of rules of construction, presumptions, and rules of law, in reference to wills, and of extrinsic evidence in construction, and covering latent and patent ambiguities, see Chaplin on Wills, 438 *et seq.*, and 458 *et seq.* The book last cited also states the *prima facie* meanings of "issue;" "relations;" "representatives;" "heirs;" "next of kin;" children *in ventre sa mere;* various usual "precatory" words; words of substitution and survivorship.

that will avoid intestacy. *Schult* v. *Moll*, 132 N. Y. 122; *Vernon* v. *Vernon*, 53 N. Y. 351 (361); *Barnard* v. *Crossman*, 54 Hun, 53 (55); *Lamb* v. *Lamb*, 131 N. Y. 227; *Du Bois* v. *Ray*, 35 N. Y. 162 (168); *Post* v. *Hover*, 33 N. Y. 593 (601); *Roe* v. *Vingut*, 117 N. Y. 204 (218); *Cochrane* v. *Shell*, 140 N. Y. 516 (532); *Toms* v. *Williams*, 41 Mich. 552 (566).

§ 760. **The law favors the heir** and next of kin. In cases of doubtful construction the tendency of the law is to favor that which permits descent to remain in the line of ancestral blood. *Knowlton* v. *Atkins*, 134 N. Y. 313 (321); *Quinn* v. *Hardenbrook*, 54 N. Y. 83; *Wood* v. *Mitcham*, 92 N. Y. 375. For a comparison of the last two rules, see *Howland* v. *Clendenin*, 134 N. Y. 305 (308, 311). The law also favors equality among children in the distribution of estates; and favors vested rather than contingent dispositions. *Stokes* v. *Weston*, 142 N. Y. 433.

§ 761. **Public policy.**—If after an instrument goes into effect, the public policy affecting its dispositions is changed, as to future instruments, yet if it is of doubtful construction the court leans in favor of a meaning consistent with present public policy. *Chwatal* v. *Schreiner*, 148 N. Y. 683 (690). See *ante*, § 750.

CHAPTER XXXI.

APPLICATION OF STATUTES TO PERSONALTY.

§ 762. **Introductory.**—The question of the applicability to trusts and powers affecting personal property, of Articles Second and Third of Title II., of Chapter I., of the Second Part of the Revised Statutes, now amended and embodied in Articles III. and IV. of the Real Property Law, has been considered in many cases. Some of the provisions have been held to affect both real and personal property, while it is also settled that others apply to real property only ; and as to still others, the rule is yet in doubt.

§ 763. **Form of the statutes.**—Part II. of the Revised Statutes was thus entitled : " An act concerning the acquisition, the enjoyment and the transmission of property, real and personal ; . . ." The preamble was in the following words : " Whereas it is expedient that the several statutes of this State, relating to the acquisition, the enjoyment and the transmission of property, *real and personal*, . . . should be consolidated and arranged in appropriate chapters, titles and articles ; that the language thereof should be simplified ; and that omissions and other defects should be supplied and amended, ..." Chapter I. was entitled " Of Real Property, and of the Nature, Qualities and Alienation of Estates therein." Title II. of that chapter was entitled " Of the Nature and Qualities of Estates in Real Property, and the Alienation thereof." Article First of that Title dealt with " The Creation and Division of Estates." Article Second was devoted to " Uses and Trusts." Article Third was entitled " Of Powers," and defined a power as " an authority to do some act in relation to *lands*, or the creation of estates therein," etc. Article Fourth was entitled " Of Alienation by

Deed." Succeeding titles related to "Dower," etc. Chapter II. was entitled "Of Title to Real Property by Descent," and Chapter III. "Of the Proof and Recording of Conveyances of Real Estate," etc. Chapter IV. was entitled "Of Title to Personal Property in certain cases," and its various titles were devoted to Partnerships; Bills and Notes, etc.; Chattel Mortgages; Interest; Factors, etc.; Unclaimed Baggage, etc.; Conditional Sales. Title IV. of that chapter was entitled "Of Accumulations of Personal Property, and of Expectant Estates in such Property." It is thus seen that so far as the mere form went, in which the statute was cast, it placed the articles "Of Uses and Trusts," and "Of Powers," in the division devoted to Real Estate. To a certain extent, however, the statute itself in terms rendered the real estate statutes applicable to personal property, for in Title IV. of Chapter IV., after making a special provision, similar in most, but not all, respects to that applicable to real property, in regard to the suspension of absolute ownership, it was provided (2 R. S. 773, § 2, not repealed in 1896) that "In all other respects, limitations of future or contingent interests in personal property, shall be subject to the rules prescribed in the first chapter of this act, in relation to future estates in lands." It then proceeds to make special provisions relating to the accumulation of interest, etc., arising from personal property.

The provisions of the Revised Statutes, relating to express trusts and powers, which were included in Chapter I., "Of Real Property," etc, have (with one exception) been repealed, and (in substance) re-enacted as part of the Real Property Law. Chapter IV., relating to Personal Property, has not (in 1896) been repealed.

(1) *When Assimilated.*[1]

§ 764. **By statute.**—(*a*) Apart from the rule specifically relating to suspension of absolute ownership, "limitations of *future* or *contingent* interests in personal property, shall be subject to the rules prescribed in the first chapter (1 R. S. 718–750) of this

[1] The following enumeration of instances is given by way of illustration. Other examples are to be found under the head of Personal Property in the Index.

Act [now covered by the Real Property Law], in relation to future estates in lands." 1 R. S. 773, § 2. *Thompson* v. *Clendening*, 1 Sandf. Ch. 387 (398); *Cook* v. *Lowry*, 95 N. Y. 103 (108 *et seq.*) and cases cited; *Gilman* v. *Reddington*, 24 N. Y. 9 (13); *Graff* v. *Bonnett*, 31 N. Y. 9 (13); *Clute* v. *Bool*, 8 Pai. Ch. 83 (85); *Kane* v. *Gott*, 24 Wend. 641 (664); *Ham* v. *Van Orden*, 84 N.Y. 257 (270); *Mills* v. *Husson*, 140 N. Y. 99 (104); *Strang* v. *Strang*, 4 Redf. 376 (379); *Matter of Lupham*, 37 Hun, 15 (18); *Blanchard* v. *Blanchard*, 4 Hun, 287, aff'd 70 N. Y. 615.

(*b*) The statutes relating to *suspension* of the absolute power of alienation of land, and to the suspension of absolute ownership of personalty (1 R. S. 773, § 1), are similar, but not identical. *Morton* v. *Morton*, 8 Barb. R. 18 (22). The test of suspension, viz., the absence of persons who together can transfer a present absolute title, is the same in both. *Sawyer* v. *Cubby*, 146 N. Y. 192 (196); *Murphy* v. *Whitney*, 140 N. Y. 541 (545).

(*c*) The statutes relating to the *accumulation* of the rents of realty, and the income of personalty (1 R. S. 773, § 3-5), are similar, but not identical. They are discussed together (*ante*, § 404 *et seq.*).

(*d*) *Vesting in the court.* *Ante*, §§ 125, 126; Chap. XXVI.

(*e*) *Appointment of successor.* *Ante*, §§ 125, 126; Chap. XXVI.

§ 765. **By analogy.**—"There is a manifest propriety in assimilating as far as practicable the rules governing trusts and limitations of real and personal property, and the tendency in this direction has been very marked in the decisions of the courts." *Cochrane* v. *Schell*, 140 N. Y. 516 (534). In the case cited, the court relied, as a basis, on a well-settled principle relating to trusts of personalty, and applied it, by analogy, to a trust of realty. Most of the authorities are cases where rules relating to realty are applied to personalty. Also *Mills* v. *Husson*, 140 N. Y. 99. The rule thus is that where it has been established that a given result follows from a given disposition in one class of property, the tendency is to apply the same principle to the other class. And this rule works in both directions. The illustrative cases may be classified as follows:

(*a*) Right of *creditors* of a beneficiary to reach the surplus income. *Williams* v. *Thorn*, 70 N. Y. 270 ; *Hallett* v. *Thompson*, 5 Pai. Ch. 583 ; *Rider* v. *Mason*, 4 Sandf. Ch. 351 ; *Sillick* v. *Mason*, 2 Barb. Ch. 79 ; *Bramhall* v. *Ferris*, 14 N. Y. 41 ; *Scott* v. *Nevins*, 6 Duer, 672 ; *Graff* v. *Bonnett*, 31 N. Y. 9 ; *Mills* v. *Husson*, 140 N. Y. 99 (105) ; *Wetmore* v. *Truslow*, 51 N. Y. 338 ; see *ante*, § 705 *et seq.*

(*b*) *Inalienability* of beneficiary's interest under a trust to receive and apply income. *Graff* v. *Bonnett*, 31 N. Y. 9 ; *Campbell* v. *Foster*, 35 N. Y. 361 ; *Mills* v. *Husson*, 140 N. Y. 99 (105) ; *Roosevelt* v. *Roosevelt*, 6 Hun, 31 (43 *et seq.*), aff'd 64 N. Y. 651 ; *Matter of Hoyt*, 5 Dem. 432 ; *Cochrane* v. *Schell*, 140 N. Y. 516. *Ante*, Chap. IX.

(*c*) *Next eventual estate.* The statute prescribing the cases in which rents and profits, undisposed of, belong to those presumptively entitled to the next eventual estate, applies to both real and personal property. *Cook* v. *Lowry*, 95 N. Y. 103 ; *Gilman* v. *Reddington*, 24 N. Y. 9 (19) ; *Mills* v. *Husson*, 140 N. Y. 99 (104). See also *ante*, § 489 *et seq.*

(*d*) *Tenancy in common.* In a bequest of personalty, as in a devise, to two or more, in their own right, the legatees take as tenants in common, unless the contrary is expressed. *Matter of Kimberly*, 150 N. Y. 90 (93). The same principle applies to beneficial interests under trusts to receive and apply the rents and income, of both real and personal property. *Ante*, § 371.

(*e*) The principle that a trust to pay over the rents, implies authority to collect and receive them, and so, that the trust is active, applies to trusts of personal property. *Knox* v. *Jones*, 47 N. Y. 389 (396). But compare *Onondaga T. & D. Co.* v. *Price*, 87 N. Y. 542 (547).

(*f*) That no title vests in the beneficiary. *Knox* v. *Jones*, 47 N. Y. 389 (396).

(*g*) *Implication of termination.* Sections 89 and 90 of the Real Property Law, providing that when the purpose for which an express trust is created ceases, the estate of the trustee shall also cease ; and that in case of transfers to trustees for the benefit of creditors, the trust, in the absence of any different limitation in the trust instrument, or in any special provision of law, shall cease at the end of twenty-five years, and that the estate or

interest remaining in the trustee or trustees shall thereon revert to the assignor, his heirs, devisee or assignee, as if the trust had not been created, apply also to corresponding trusts of personalty. *Mills* v. *Husson*, 140 N. Y. 99.

(*h*) *Removal and resignation of trustees.* Section 92 of the Real Property Law applies to both classes of property. *Harrison* v. *U. T. Co.*, 144 N. Y. 326. *Ante*, §§ 127, 128, 336 *et seq.*, 344 *et seq.*

(*i*) *Lapse.* When the reason for a difference between rules applicable to real and to personal property, is abrogated by statute, the difference itself may disappear. Thus, lapsed legacies at common law fell into the residuary estate, but lapsed devises did not. The basis on which the distinction rested was removed by 2 R. S. 57, § 5, thus resulting indirectly in coalescing the rules and making both kinds of lapsed gifts fall into the residuary clause. *Ante*, § 523. *Cruikshank* v. *Home for the Friendless*, 113 N. Y. 337 (354); *Matter of Crossman*, 113 N. Y. 503 (510).

(*j*) *Acts in contravention* of a personal property trust, by the trustee, are void as to those who have actual or constructive notice. This principle is not, however, based on the theory of analogy to the statute on that point, but is the original principle, affecting all trusts, of which that statute is a partial codification. *McPherson* v. *Rollins*, 107 N. Y. 316.

(*k*) *Powers.* The provisions of the Revised Statutes relating to powers, govern the creation, construction and execution of powers concerning personalty, so far as they can be applied, as well as powers relating to real property. "There should not be two rules, one applicable to personal and the other to real estate." The statute "abolishes all powers theretofore existing in reference to both real and personal estate." *Hutton* v. *Benkard*, 92 N. Y. 295 (304); *Cook* v. *Lowry*, 95 N. Y. 103 (111). This principle has been applied, for example:

(1) To the provision that "real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the power, appears, expressly or by necessary implication," Real Prop. L., § 156. *Ante*, § 647. *Hutton* v. *Benkard*, 92 N. Y. 295 (304); *Mott* v. *Ackerman*, 92 N. Y.

539 (549); *N. Y. L. Ins. & T. Co.* v. *Livingston*, 133 N. Y. 125.

(2) To the provision that "powers, as they existed by law on the thirty-first day of December, 1829, have been abolished," Real Prop. L., § 110; *Hutton* v. *Benkard*, 92 N. Y. 295 (304).

(3) To the rule (abrogating that of the common law), that where a person has a general beneficial power of appointment solely by will over property, and has exercised the power, the property does not form part of his assets and is not chargeable after his death with his debts. *Cutting* v. *Cutting*, 86 N. Y. 522 (535, 544 *et seq.*). *Ante*, § 711.

(4) To the rule that "where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers, and encumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts." Real Prop. L., § 129; *Brown* v. *F. L. & T. Co.*, 51 Hun, 386 (aff'd in 117 N. Y. 266, where, however, this point was not referred to). *Ante*, § 561 *et seq.*

(5) The statute, Real Prop. L., § 91, providing for the devolution of a trust upon the death of the sole or last surviving trustee, is incorporated by reference, Real Prop. L., § 162, into the Article on Powers, which latter relates in terms to real property. *Delaney* v. *McCormack*, 88 N. Y. 174 (182); *Farrar* v. *McCue*, 89 N. Y. 139 (144.) Therefore, under the principles established in the cases already cited in this subdivision, it would appear appropriate that in its reference, by analogy, to powers affecting personal property, § 162 of the Real Prop. Law should be held to incorporate L. 1882, ch. 185, which effects, as to trusts of personal property, a result similar to that effected as to trusts of real property by Real Prop. L., § 91, *supra*. See *ante*, § 125, and compare *Greenland* v. *Waddell*, 116 N. Y. 234 (242). It is further to be noticed, that whereas the section (1 R. S. 730, § 68) for which Real Prop. L., § 91, is now substituted, was construed by the courts to relate, by its omission of reference to "next of kin," to real property only, and L. 1882, chap. 185, was accordingly enacted, referring to next of kin, and covering the case of

personal property, yet the present section, Real Prop. L., § 91, employs the term next of kin, as well as heirs, and may be intended expressly to cover both classes of property, and so to be incorporated, as to both classes, into § 162 of the Article on Powers. But L. 1882, chap. 185, still stands (in 1896) unrepealed.

(6) So the provision in Real Prop. L., § 92, for the removal of a trustee, or for his resignation, and for the appointment of a successor (*ante*, §§ 121 *et seq.* ; 336 *et seq.* ; 344 *et seq.*), is extended by § 162 of the Real Prop. Law to cover the case of powers. *Leggett* v. *Hunter*, 19 N. Y. 445 (459). As to whether § 162 applies to powers relating to personal property, see *Greenland* v. *Waddell*, 116 N. Y. 234 (242).

(7) " The great preponderance of authority now is that a power without restriction, to sell and convey real estate, gives authority to the agent to deliver deeds with general warranty binding on the principal, where, under the circumstances, this is the common and usual mode of assurance." Such has been declared to be the rule in personalty, *Nelson* v. *Cowing*, 6 Hill, 336, and " there seems to be no well-founded distinction between real and personal property, requiring a different construction of an agency for sale in the two cases." See *Schultz* v. *Griffin*, 121 N. Y. 294.

(2) *When not Assimilated.*[1]

§ 766.—The courts have held that the following provisions of the Statute of Trusts do not apply to personalty :

(*a*) The provision that all trusts—except four certain specified classes—are abolished. There is no restriction on the purpose for which personal property trusts may be created, except that they must not be in their nature hostile to general principles of the law. *Genet* v. *Beekman*, 26 N. Y. 35 (41) ; *Beardsley* v. *Hotchkiss*, 96 N. Y. 201 (216) ; *Manice* v. *Manice*, 43 N. Y. 303 (381) ; *Holmes* v. *Mead*, 52 N. Y. 332 (343) ; *De Peyster* v. *Clendining*, 8 Pai. Ch. 295 (305), aff'd 26 Wend. 21. For an illustration of a purpose not authorized, see *Hallett* v. *Thompson*, 5 Pai. Ch. 583.

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[1] See note, *ante*, § 764.

(*b*) The implication of a trust, where necessary, from a direction to receive the rents of realty, does not have the same force in the case of a direction to receive income of personalty. *Onondaga T. & D. Co.* v. *Price*, 87 N. Y. 542 (547). Compare *Knox* v. *Jones*, 47 N. Y. 389 (396).

(*c*) The permissible term of a personal property trust which suspends the absolute ownership, is "two lives in being." The provision for further suspension, in certain cases, for a minority, in trusts of real property, does not apply. *Beardsley* v. *Hotchkiss*, 96 N. Y. 201 (216); *Manice* v. *Manice*, 43 N. Y. 303 (381); *Greenland* v. *Waddell*, 116 N. Y. 234 (245). *Ante*, § 392. [1]

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[1] The following decisions were published too late for insertion in the appropriate places in the text: Charging costs on trustee personally, *Smith* v. *Farmer Typefounding Co.*, 18 Misc. 434, reversing, on that point, s. c. 17 Misc. 311. Overpayment, liability to refund to estate, *Buffalo L. T. & S. D. Co.* v. *Leonard*, 9 App. Div., 384. Savings bank deposit, when in trust, *Haynes* v. *McKee*, 18 Misc. 361. Lunatic beneficiary, comparison of duties of committee and of trustee as to appropriate expenditures; and distinction between property owned by the lunatic, and property held in trust for him with right to apply corpus, but with remainder over to others of what might be left. *Matter of Reed*, 18 Misc. 285, and cases there cited. Direction to pay or distribute in future, when consistent with vesting. *Matter of Embree*, 9 App. Div. 602. Satisfaction of mortgage, when trustee authorized to execute for less than its face. *Bendheim* v. *Morrow*, 9 App. Div. 617. Secret trusts; *President &c.* v. *Merritt*, 75 Fed. R. 480; the recent decision upon the *Edson* will, referred to in earlier sections, has not been reported up to December 17th, 1896. *Bliss* v. *Fosdick*, 86 Hun, 162, is affirmed in 151 N. Y. (Memo.), p. 7. Attention is called to a misprint, or slip of the pen, on p. 373, where, beginning in the 17th line, the text should read "the theory that an *illegal* suspension can be occasioned solely by a future estate," and, beginning in the 21st line, "that present trusts of that class *cannot* occasion *illegal* suspension at all." Partition; suit for by remaindermen; authority of trustee of precedent life estate to consent to sale under Code C. P. 1533. *Taylor* v. *Kavanagh*, Daily L. J., Dec. 22d, 1896, p. 852.

APPENDIX.

I.

TABLE SHOWING SOURCES OF SECTIONS CITED FROM THE REAL PROPERTY LAW.

Tenure of Real Property.

Real Prop. L.	1 *R. S.*
§ 1	750, §§ 10, 11.
§ 2	719, § 8.
§ 3	§ 10.
§§ 4–9	See Birdseye's R. S., 2d ed., pp. 2601–2603.

Creation and Division of Estates.

§ 20	722, § 1.
§ 21	§ 2.
§ 22	§§ 3, 4.
§ 23	§ 5.
§ 24	§ 6.
§ 25	§ 7; 723; § 8.
§ 26	§ 9; 726, § 42
§ 27	723, § 10.
§ 28	§ 11.
§ 29	§ 12.
§ 30	§ 13.
§ 31	New.
§ 32	723, §§ 14, 15, 16.
§ 33	§ 17.
§ 34	724, § 18.
§ 35	§ 19.
§ 36	§ 20.
§ 37	§ 21.
§ 38	§ 22.
§ 39	§ 23.
§ 40	§ 24.
§ 41	§ 25.
§ 42	§ 26.
§ 43	725, § 27.
§ 44	§ 28.
§ 45	§ 29.

Real Prop. L.	1 *R. S.*
§ 46	§§ 30, 31.
§ 47	§§ 32, 33.
§ 48	§ 34.
§ 49	§ 35.
§ 50	§ 36.
§ 51	726, §§ 37, 38.
§ 52	§ 39 (as amended L. 1891, ch. 172).
§ 53	§ 40.
§ 54	§ 41.
§ 55	§ 43.
§ 56	727, § 44.

Uses and Trusts.

§ 70	727, § 46.
§ 71	727, § 45.
§ 72	727, §§ 47, 48.
§ 73	728, §§ 49, 50.
§ 74	728, §§ 51, 52, 53.
§ 75	728, § 54.
§ 76	728, § 55 (as amended L. 1830, ch. 320, § 10).[1]
§ 77	729, § 56.
§ 78	729, § 57.
§ 79	729, §§ 58, 59.
§ 80	729, § 60.
§ 81	729, § 61.
§ 82	729, § 62.
§ 83	730, § 63 (as amended L. 1893, ch. 452; not repealed).
§ 84	730, § 64.
§ 85	730, § 65 (as amended L. 1895, ch. 886).
§ 86	730, § 65 (as amended L. 1895, ch. 886).
§ 87	730, § 65 (as amended L. 1895, ch. 886).
§ 88	730, § 66.
§ 89	730, § 67.
§ 90	730, § 67 (as amended L. 1875, ch. 545).
§ 91	730, § 68; L. 1882, ch. 185 (?), (not repealed).
§ 92	730, §§ 69, 70, 71; 731, § 72.
§ 93	L. 1893, ch. 701 (not repealed).

Powers.

§ 110	732, § 73; 738, § 134.
§ 111	732, § 74.
§ 112	738, § 135.
§ 113	732, § 76.
§ 114	732, § 77.

[1] See Mr. Birdseye's note to this section in his 2d ed. of the R. S.

Real Prop. L.	1 *R. S.*
§ 115	732, § 78.
§ 116	732, § 79; 733, § 92.
§ 117	734, § 94.
§ 118	734, § 95 (as amended L. 1830, ch. 320).[1]
§ 119	732, § 75.
§ 120	735, § 106.
§ 121	735, § 109.
§ 122	732, § 80.
§ 123	733, § 87.
§ 124	735, § 105.
§ 125	733, § 86.
§ 126	737, § 133.
§ 127	735, § 107.
§ 128	735, § 108.
§ 129	732, § 81.
§ 130	732, § 82.
§ 131	733, § 83.
§ 132	733, § 84.
§ 133	733, § 85.
§ 134	New.
§ 135	733, §§ 88, 89.
§ 136	733, §§ 90, 91.
§ 137	734, §§ 96, 97.
§ 138	734, §§ 98, 99.
§ 139	734, § 93.
§ 140	734, § 100.
§ 141	734, § 101.
§ 142	735, § 103.
§ 143	737, § 131.
§ 144	735, § 104.
§ 145	735, § 113.
§ 146	735, § 112.
§ 147	736, § 115.
§ 148	736, § 116.
§ 149	736, § 118.
§ 150	736, § 119.
§ 151	736, § 120.
§ 152	736, § 121.
§ 153	736, § 122.
§ 154	New.
§ 155	737, § 124.
§ 156	737, § 126.
§ 157	737, § 123.
§ 158	737, § 128.
§ 159	737, § 129.

[1] See Mr. Birdseye's note to this section in his 2d ed. of the R. S.

Real Prop. L.	1 *R. S.*
§ 160	737, § 132.
§ 161	737, § 125.
§ 162	734, § 102.

Conveyances and Mortgages.

§ 205	1 R. S. 736, § 114. 1 R. S. 748, §§ 1, 2. 2 R. S. 137, §§ 6, 7.
§ 207	2 R. S. 134, § 6. 2 R. S. 135, § 7 (as amended L. 1860, ch. 322.)
§ 208	1 R. S. 738, § 137.
§ 209	1 R. S. 738, § 138.
§ 210	1 R. S. 739, §§ 143, 144. 1 R. S. 748, § 1.
§ 211	1 R. S. 739, § 142.
§ 212	1 R. S. 739, § 145.
§ 221	L. 1890, ch. 475, § 3.
§ 223	L. 1890, ch. 475, § 6.
§ 225	1 R. S. 739, §§ 147, 148.
§ 226	2 R. S. 134, §§ 1, 2.
§ 227	2 R. S. 137, § 1 (not repealed).
§ 228	2 R. S. 137, § 3.
§ 229	2 R. S. 137, § 4.
§ 230	2 R. S. 137, § 5.
§ 231	2 R. S. 134, §§ 3, 4, 5.
§ 232	L. 1858, ch. 314 (as amended L. 1889, ch. 487, L. 1894, ch. 740; not repealed).
§ 233	L. 1894, ch. 315.

Recording.

§ 240	1 R. S. 736, § 114. 1 R. S. 762, §§ 36–39. 1 R. S. 763, §§ 42–43.
§ 241	1 R. S. 756, § 1.
§ 242	1 R. S. 756, § 4.
§ 244	1 R. S. 762, § 39.
§ 273	1 R. S. 763, § 40.
§ 276	L. 1880, ch. 530, § 1.

Descent of Real Property.

§ 280	1 R. S. 754, §§ 20, 21, 27. 1 R. S. 755, §§ 28, 29.
§ 294	1 R. S. 754, § 22.
§ 295	1 R. S. 737, § 127. 1 R. S. 754, §§ 23–26.
§ 296	New.

II.

TABLE OF COMPARATIVE TEXTS OF THE REAL PROPERTY LAW AND THE EARLIER STATUTES.

Revised Statutes.	*Real Property Law.*
1 R. S. 723, § 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this Article. Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed. *Id.*, § 15. The absolute power of alienation, shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section. *Id.*, § 16 A contingent remainder in fee, may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, or upon any other contingency, by which the estate of such persons may be determined before they attain their full age.	§ 32. The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section a minority is deemed a part of a life and not an absolute term equal to the possible duration of such minority.
1 R. S. 724, § 23. All the provisions contained in this Article, relative to future estates, shall be construed to apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years, shall not be suspended for a longer period than the absolute power of alienation can be suspended, in respect to a fee.	§ 39. All the provisions contained in this article, relative to future estates, apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.
1 R. S. 725, § 36. Dispositions of the rents and profits of lands, to accrue and	§ 50. A disposition of the rents and profits of real property to accrue and

Revised Statutes.

be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in this Article, in relation to future estates in lands.

1 R. S. 726, § 37. An accumulation of rents and profits of real estate, for the benefit of one or more persons, may be directed by any will or deed, sufficient to pass real estate, as follows:

1. If such accumulation be directed to commence on the creation of the estate, out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority:

2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it shall commence within the time in this Article permitted for the vesting of future estates and during the minority of persons for whose benefit it is directed, and shall terminate at the expiration of such minority.

Id., § 38. If, in either of the cases mentioned in the last section, the direction for such accumulation shall be for a longer term than during the minority of the persons intended to be benefited thereby, it shall be void as respects the time beyond such minority. And all directions for the accumulation of the rents and profits of real estate, except such as are herein allowed, shall be void.

Id., § 39. Where such rents and profits are directed to be accumulated for the benefit of infants entitled to the expectant estate, and such infants shall be destitute of other sufficient means of support and education, the Supreme Court at special term, and, where such accumulation has been directed by a last will and testament, the Surrogate's

Real Property Law.

be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in this article, for future estates in real property.

§ 51. All directions for the accumulation of the rents and profits of real property, except such as are allowed by statute, shall be void. An accumulation of rents and profits of real property, for the benefit of one or more persons, may be directed by any will or deed sufficient to pass real property as follows:

1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority.

2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it must commence within the time permitted, by the provisions of this article, for the vesting of future estates, and during the minority of the beneficiaries, and shall terminate at or before the expiration of such minority.

3. If in either case such direction be for a longer term than during the minority of the beneficiaries it shall be void only as to the time beyond such minority.

§ 52. Where such rents and profits are directed to be accumulated for the benefit of a minor entitled to the expectant estate, and such minor is destitute of other sufficient means of support and education, the Supreme Court, at a special term, or, if such accumulation has been directed by will, the Surrogate's Court of the county in which

Revised Statutes.	*Real Property Law.*
Court of any county in which such last will and testament has been admitted to probate, upon the application of their guardian, may direct a suitable sum out of such rents and profits to be applied to their maintenance and education. *As amended,* L 1891, ch. 172.	such will has beeen admitted to probate. may, on the application of his general or testamentary guardian, direct a suitable sum out of such rents and profits to be applied to his maintenance or education.
Id., § 40. When, in consequence of a valid limitation of an expectant estate, there shall be a suspense of the power of alienation or of the ownership, during the continuance of which, the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate.	§ 53. When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate.
Id., § 41. The delivery of the grant, where an expectant estate is created by grant; and where it is created by devise, the death of the testator, shall be deemed the time of the creation of the estate.	§ 54. Where an expectant estate is created by grant, the delivery of the grant, and, where it is created by devise, the death of the testator, shall be deemed the time of the creation of the estate.
1 R. S. 727, § 45. Uses and trusts, except as authorized and modified in this Article, are abolished; and every estate and interest in lands, shall be deemed a legal right, cognizable as such in the courts of law, except when otherwise provided in this Chapter.	§ 71. Uses and trusts concerning real property, except as authorized and modified by this Article, have been abolished; every estate or interest in real property is deemed a legal right, cognizable as such in the courts, except as otherwise prescribed in this Chapter.
Id., § 46. Every estate which is now held as an use, executed under any former statute of this State, is confirmed as a legal estate.	§ 70. Every estate which is now held as a use, executed under any former statute of the State, is confirmed as a legal estate.
Id., § 47. Every person, who, by virtue of any grant, assignment or devise, now is, or hereafter shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest.	§ 72. Every person, who, by virtue of any grant, assignment or devise, is entitled both to the actual possession of real property, and to the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest; but this section does not divest the estate

Revised Statutes.	*Real Property Law.*
Id., § 48. The last preceding section shall not divest the estate of any trustees, in any existing trust, where the title of such trustees, is not merely nominal, but is connected with some power of actual disposition or management, in relation to the lands which are the subject of the trust.	of the trustee in any trust existing on the first day of January, eighteen hundred and thirty, where the title of such trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the real property which is the subject of the trust.
1 R. S. 728, § 49. Every disposition of lands, whether by deed or devise hereafter made, shall be directly to the person in whom the right to the possession and profits, shall be intended to be invested, and not to any other, to the use of, or in trust for, such person ; and if made to one or more persons, to the use of, or in trust for, another, no estate or interest, legal or equitable, shall vest in the trustee. *Id.*, § 50. The preceding sections in this Article shall not extend to trusts arising, or resulting by implication of law, nor be construed to prevent or affect the creation of such express trusts, as are hereinafter authorized and defined.	§ 73. Every disposition of real property, whether by deed or by devise, shall be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to another to the use of, or in trust for, such person ; and if made to any person to the use of, or in trust for another, no estate or interest, legal or equitable, vests in the trustee. But neither this section nor the preceding sections of this Article shall extend to the trusts arising, or resulting by implication of law, nor prevent or affect the creation of such express trusts as are authorized and defined in this Chapter.
Id., § 51. Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made ; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section. *Id.*, § 52. Every such conveyance shall be presumed fraudulent, as against the creditors, at that time, of the person paying the consideration ; and where a fraudulent intent is not disproved, a trust shall result in favor of such creditors, to the extent that may be necessary to satisfy their just demands. *Id.*, § 53. The provisions of the pre-	§ 74. A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands ; but the title vests in the grantee, and no use or trust results from the payment to the person paying the consideration, or in his favor, unless the grantee either, 1. Takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration, or, 2. In violation of some trust, purchases the property so conveyed with

Revised Statutes.	*Real Property Law.*
ceding fifty-first section shall not extend to cases, where the alienee named in the conveyance, shall have taken the same as an absolute conveyance in his own name, without the consent or knowledge of the person paying the consideration, or where such alienee, in violation of some trust, shall have purchased the lands so conveyed, with monies belonging to another person.	money or property belonging to another.
Id., § 54. No implied or resulting trust shall be alleged or established, to defeat or prejudice the title of a purchaser, for a valuable consideration, and without notice of such trust.	§ 75. An implied or resulting trust shall not be alleged or established, to defeat or prejudice the title of a purchaser for a valuable consideration without notice of the trust.
Id., § 55. Express trusts may be created for any or either of the following purposes : 1. To sell lands for the benefit of creditors : 2. To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon : 3. To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the first article of this title. *As amended* 1830, ch. 320, § 10.[1]	§ 76. An express trust may be created for one or more of the following purposes : 1. To sell real property for the benefit of creditors ; 2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon ; 3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto ;
4. To receive the rents and profits of lands, and to accumulate the same, for the purposes and within the limits prescribed in the first article of this title.	4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law.
1 R. S. 729, § 56 A devise of lands to executors or other trustees, to be sold or mortgaged, where the trustees are not also empowered to receive the rents and profits, shall vest no estate in the trustees ; but the trust shall be valid as a power, and the lands shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power.	§ 77. A devise of real property to an executor or other trustee, for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him ; but the trust shall be valid as a power, and the real property shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power.

[1] See Mr. Birdseye's note to Real Prop. L., § 76, in his 2d ed. of the R. S.

Revised Statutes.	*Real Property Law.*
Id., § 57. Where a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable, in equity, to the claims of the creditors of such person, in the same manner as other personal property, which cannot be reached by an execution at law.	§ 78. Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which cannot be reached by execution.
Id., § 58. Where an express trust shall be created, for any purpose not enumerated in the preceding sections, no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions in relation to such powers, contained in the third article of this title. *Id.*, § 59. In every case where the trust shall be valid as a power, the lands to which the trust relates, shall remain in, or descend to the persons otherwise entitled, subject to the execution of the trust as a power.	§ 79. Where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article, no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions of this chapter. Where a trust is valid as a power, the real property to which the trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power.
Id., § 60. Every express trust, valid, as such, in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust. The persons for whose benefit the trust is created, shall take no estate or interest in the lands, but may enforce the performance of the trust in equity.	§ 80. Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust.
Id., § 61. The preceding section shall not prevent any person creating a trust, from declaring to whom the lands to which the trust relates, shall belong, in the event of the failure or termination of the trust; nor shall it prevent him from granting or devising such lands,	§ 81. The last section shall not prevent any person, creating a trust, from declaring to whom the real property, to which the trust relates, shall belong, in the event of the failure or termination of the trust, or from granting or devising the property, subject to the

Revised Statutes.	*Real Property Law.*
subject to the execution of the trust. Every such grantee or devisee shall have a legal estate in the lands, as against all persons, except the trustees and those lawfully claiming under them.	execution of the trust. Such a grantee or devisee shall have a legal estate in the property, as against all persons, except the trustees, and those lawfully claiming under him.
Id., § 62. Where an express trust is created, every estate and interest not embraced in the trust and not otherwise disposed of, shall remain in, or revert to, the person creating the trust, or his heirs, as a legal estate.	§ 82. Where an express trust is created, every legal estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to, the person creating the trust or his heirs.
1 R. S. 730, § 63. No person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable. (Not repealed in 1896. By L. 1893, ch. 452, also not repealed in 1896, a further clause was here added, corresponding in general with the second sentence of Real Prop. L, § 83, given opposite.)	§ 83. The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, cannot be transferred by assignment or otherwise; but the right and interest of the beneficiary of any other trust may be transferred. Whenever a beneficiary in a trust for the receipt of the rents and profits of real property, is entitled to a remainder in the whole or a part of the principal fund so held in trust subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such rents and profits, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder.
Id., § 64. Where an express trust is created, but is not contained or declared in the conveyance to the trustees, such conveyance shall be deemed absolute, as against the subsequent creditors of the trustees, not having notice of the trust, and as against purchasers from such trustees, without notice, and for a valuable consideration.	§ 84. Where an express trust is created, but is not contained or declared in the conveyance to the trustee, the conveyance shall be deemed absolute as to the subsequent creditors of the trustee not having notice of the trust, and as to subsequent purchasers from the trustee, without notice and for a valuable consideration.
Id., § 65. Where the trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustees, in contravention of the trust, shall be absolutely	§ 85. If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee, in contravention of the trust, except as provided in this section, shall

Revised Statutes.

void [provided, however, that the Supreme Court shall have power, upon such terms and conditions as to the court shall seem just and proper, in any case to authorize any such trustee to mortgage or sell any such real estate whenever it shall appear to the satisfaction of said court, or a judge thereof, that it is for the best interest of said estate so to do, and that it is necessary, and for the benefit of the estate, to raise by mortgage thereon, or by a sale thereof, funds for the purpose of preserving or improving such estate, or whenever the interest of the trust estate in any real property is an undivided share or part thereof; and it shall satisfactorily appear to the court or a judge thereof that on that account it is for the best interest of the trust estate to authorize the trustee to sell such undivided part or share. No order directing such trustee to mortgage or sell said lands shall be granted, unless it shall appear to the satisfaction of such court or judge that a notice in writing, stating the time and place of making the application therefor, has been served upon the beneficiary or beneficiaries of said trust, at least eight days before making such application, if said beneficiary or beneficiaries are within this State and adult. In case said beneficiary or beneficiaries are infants, lunatics, persons of unsound mind, habitual drunkards or absentees, said court or judge shall not direct the trustees to mortgage or sell said lands until such beneficiary or beneficiaries are brought into court by such notice as said court or judge may prescribe. Where a trustee is appointed to hold real estate during the life of a beneficiary, and to pay or apply the rents, income and profits thereof, to or for the use of such beneficiary, the Supreme Court shall have power to authorize such trustee to lease said real estate for such a term of years,

Real Property Law.

be absolutely void. The Supreme Court may, by order, on such terms and conditions as seem just and proper, authorize any such trustee to mortgage or sell such real property, or any part thereof, whenever it appears to the satisfaction of the court that it is for the best interest of such estate, or that it is necessary and for the benefit of the estate, to raise funds for the purpose of preserving and improving it; and whenever the interest of the trust estate in any real property is an undivided part or share thereof, the same may be sold, if it shall appear to the court to be for the best interest of such estate.

§ 86. A trustee appointed to hold real property during the life of a beneficiary, and to pay or apply the rents, income and profits thereof to, or for, the use of such beneficiary, may execute and deliver a lease of such real property for a term not exceeding five years, without application to the court. The Supreme Court may, by order, on such terms and conditions as seem just and proper, in respect to rental and renewals, authorize such a trustee to lease such real property for a term exceeding five years, if it appears to the satisfaction of the court that it is for the best interest of the trust estate, and may authorize such trustee to covenant in the lease to pay at the end of the term, or renewed term, to the lessee the then fair and reasonable value of any building which may have been erected on the premises during such term.

If any such trustee has leased any such trust property before June fourth, eighteen hundred and ninety-five, for a longer term than five years, the Supreme Court, on the application of such trustee, may, by order, confirm such lease, and such order, on the entry thereof, shall be binding on all persons interested in the trust estate.

§ 87. The Supreme Court shall not

Revised Statutes.

at such a rental and upon such terms and conditions in respect to a renewal or renewals of said lease as to the court shall seem just and proper; provided, however, that such authority shall not be given unless it shall appear to the satisfaction of the said court, or a judge thereof, that it is to the best interests of said trust estate so to do, and the said court shall, in like manner, have power to authorize the trustee to covenant in the said lease to pay at the end of the term or renewed term of said lease to the lessee or lessees, the then fair and reasonable value of any building or buildings which may be erected on the demised premises during such term or terms, such covenant to contain such other conditions for the determination of such value as to the court may seem just and proper. No order directing such trustee to lease said premises shall be granted unless it shall appear to the satisfaction of said court or judge that a notice in writing, stating the time and place of making the application therefor, was served upon the beneficiary or beneficiaries of said trust, and all other persons interested in the estate, at least eight days before making said application, if such beneficiary, beneficiaries or such other persons are within this State and adult. In case said beneficiary, beneficiaries or such other persons are infants or lunatics, persons of unsound mind, habitual drunkards or absentees, said court or judge shall not direct the trustee to lease said lands until such beneficiary, beneficiaries or such other persons are brought into court by such notice as said court or judge may prescribe. Notwithstanding the provisions herein contained, a trustee appointed for the purposes aforesaid, shall have authority, without making such application as aforesaid, to execute and deliver a lease of such real estate for a term of five years or less. In any case

Real Property Law.

grant an order under either of the last two preceding sections, unless it appears to the satisfaction of such court that a written notice, stating the time and place of the application therefor, has been served upon the beneficiary of such trust property, at least eight days before the making thereof, if such beneficiary is an adult within the state; or if a minor, lunatic, person of unsound mind, habitual drunkard or absentee, until proof of the service on such person of such notice as the court, or a justice thereof, prescribes.

Revised Statutes. *Real Property Law.*

where, before the passage of this act, a trustee appointed for the purposes aforesaid, has leased real estate so held by him in trust for a longer term than five years, an application may be made to the Supreme Court or to a judge thereof upon like notice as hereinbefore mentioned, to the beneficiary, beneficiaries or such other persons for an order confirming such lease, and if on such application it shall appear to the said court or to a judge thereof, that the lease, when made, was for the best interests of the trust estate, such order shall be entered and shall be binding on all persons interested in the trust]. (The portion in brackets was added by L. 1891, ch. 209. There had been previous amendment. See Birdseye's R. S. (1st ed.) p. 3180, 3181.)

Id., § 66. No person who shall actually and in good faith pay a sum of money to a trustee, which the trustee as such is authorized to receive, shall be responsible for the proper application of such money, according to the trust; nor shall any right or title, derived by him from such trustee, in consideration of such payment, be impeached or called in question, in consequence of any misapplication, by the trustee, of the monies paid.

§ 88. A person who shall actually and in good faith pay a sum of money to a trustee, which the trustee as such is authorized to receive, shall not be responsible for the proper application of the money, according to the trust; and any right or title derived by him from the trustee in consideration of the payment shall not be impeached or called in question in consequence of a misapplication by the trustee of the money paid.

Id., § 67, as amended. When the purposes for which an express trust shall have been created shall have ceased, the estate of the trustees shall also cease. And where an estate has been conveyed to trustees for the benefit of creditors and no different limitation is contained in the instrument creating the trust, such trust shall be deemed discharged at the end of twenty-five years from the creation of the same; and the estate conveyed to trustee or trustees and not granted or conveyed by him or them shall revert to the grantor or grantors,

§ 89. When the purpose for which an express trust is created ceases, the estate of the trustee shall also cease.

§ 90. Where an estate or interest in real property has heretofore vested or shall hereafter vest in the assignee or other trustee for the benefit of creditors, it shall cease at the expiration of twenty-five years from the time when the trust was created, except where a different limitation is contained in the instrument creating the trust, or is especially prescribed by law. The estate or interest remaining in the trustee or trustees

Revised Statutes.

his or their heirs or devisees, or persons claiming under them, to the same effect as though such trust had not been created. (The second sentence was added by L. 1875, ch. 545)

Id. § 68. Upon the death of the surviving trustee of an express trust, the trust estate shall not descend to his heirs, nor pass to his personal representatives ; but the trust, if then unexecuted, shall vest in the court of chancery, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court.

Also L. 1882, ch. 185, relating to trusts in personalty, not repealed in 1896

Id., § 69. Upon the petition of any trustee, the court of chancery may accept his resignation, and discharge him from the trust, under such regulations as shall be established by the court for that purpose, and upon such terms, as the rights and interests of the persons interested in the execution of the trust, may require.

Id., § 70. Upon the petition or bill of any person interested in the execution of a trust, and under such regulations as for that purpose shall be established, the court of chancery may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who for any other cause shall be deemed an unsuitable person to execute the trust.

Id., § 71. The chancellor shall have full power to appoint a new trustee, in place of a trustee resigned or removed ; and when, in consequence of such resignation or removal, there shall

Real Property Law.

shall thereon revert to the assignor, his heirs, devisee or assignee, as if the trust had not been created.

§ 91. On the death of the last surviving or sole trustee of an express trust, the trust estate shall not descend to his heirs nor pass to his next of kin or personal representatives ; but in the absence of a contrary direction on the part of the person creating the same, such trust, if unexecuted, shall vest in the Supreme Court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court, who shall not be appointed until the beneficiary thereof shall have been brought into court by such notice in such manner as the court or a justice thereof may direct.

§ 92. The Supreme Court has power, subject to the regulations established for the purpose in the general rules of practice :

1. On his application by petition or action, to accept the resignation of a trustee, and to discharge him from the trust on such terms as are just.

2. In an action brought, or on a petition presented, by any person interested in the trust, to remove a trustee who has violated or threatens to violate his trust, or who is insolvent, or whose insolvency is apprehended, or who for any other cause shall be deemed to be an unsuitable person to execute the trust.

3. In case of the resignation or removal of a trustee, to appoint a new trustee in his place, and in the meantime, if there is no acting trustee, to cause the trust to be executed by a receiver or other officer under its direction.

This section shall not apply to a

Revised Statutes.	*Real Property Law.*
be no acting trustee, the court in its discretion may appoint new trustees, or cause the trust to be executed by one of its officers under its direction.	trust arising or resulting by implication of law, nor where other provision is specially made by law, for the resignation or removal of a trustee or the appointment of a new trustee.
1 R. S. 731, § 72. The three last sections shall extend only to cases of express trusts.	
L. 1893, ch. 701 (§ 1). No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall in other respects be valid under the laws of this State, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee, then the title to such lands or property shall vest in the Supreme Court. (§ 2.) The Supreme Court shall have control over gifts, grants, bequests and devises in all cases provided for by section one of this act. The attorney-general shall represent the beneficiaries in all such cases, and it shall be his duty to enforce such trusts by proper proceedings in the court. (Not repealed in 1896.)	§ 93. A conveyance or devise of real property for religious, educational, charitable or benevolent uses, which is in other respects valid, is not to be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument making such conveyance or devise. If in such instrument, a trustee is named to execute the same, the legal title to the real property granted or devised shall vest in such trustee. If no person is named as trustee, the title to such real property vests in the Supreme Court, and such court shall have control thereof. The attorney-general shall represent the beneficiaries in such cases and enforce such trusts by proper proceedings.
1 R. S. 732, § 73. Powers, as they now exist by law, are abolished; and from the time this Chapter shall be in force, the creation, construction and execution of powers, shall be governed by the provisions of this Article.	§ 110. Powers, as they existed by law on the thirty-first day of December, eighteen hundred and twenty-nine, have been abolished. Hereafter the creation, construction and execution of powers, affecting real property, shall be subject to the provisions of this article; but this article does not extend to a simple power of attorney, to convey real property in the name, and for the benefit of the owner.
1 R. S. 738, § 134. The provisions of this Article shall not extend to a simple power of attorney, to convey lands in the name, and for the benefit, of the owner.	
1 R. S. 732, § 74. A power is an authority to do some act in relation to	§ 111. A power is an authority to do an act in relation to real property, or to

Revised Statutes.	*Real Property Law.*
lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power, might himself lawfully perform.	the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power, might himself lawfully perform.
Id., § 75. No person is capable in law of granting a power, who is not at the same time, capable of aliening some interest in the lands to which the power relates.	§ 119. A person is not capable of granting a power, who is not, at the same time, capable of transferring an interest in the property to which the power relates.
Id., § 76. Powers, as authorized in this Article, are general or special, and beneficial or in trust.	§ 113. A power, as authorized in this article, is either general or special, and either beneficial or in trust.
Id., § 77. A power is general, where it authorizes the alienation in fee, by means of a conveyance, will or charge of the lands embraced in the power, to any alienee whatever.	§ 114. A power is general, where it authorizes the transfer or encumbrance of a fee, by either a conveyance or a will of or a charge on the property embraced in the power, to any grantee whatever.
Id., § 78. A power is special, 1. Where the persons or class of persons, to whom the disposition of the lands under the power is to be made, are designated ; 2. Where the power authorizes the alienation, by means of a conveyance, will or charge, of a particular estate or interest less than a fee.	§ 115. A power is special where either : 1. The persons or class of persons to whom the disposition of the property under the power is to be made are designated ; or, 2. The power authorizes the transfer or encumbrance, by a conveyance, will or charge, of any estate less than a fee.
Id., § 79. A general or special power is beneficial, when no person other than the grantee has, by the terms of its creation, any interest in its execution. 1 R. S. 733, § 92. No beneficial power, general or special, hereafter to be created, other than such as are already enumerated and defined in this Article, shall be valid.	§ 116. A general or special power is beneficial, where no person, other than the grantee, has, by the term of its creation, any interest in its execution. A beneficial power, general or special, other than one of those specified and defined in this Article, is void.
1 R. S. 732, § 80. A general and beneficial power may be given to a married woman, to dispose, during her marriage, and without the concurrence of her husband, of lands conveyed or devised to her in fee.	§ 122. A general and beneficial power may be given to a married woman, to dispose, during her marriage, and without concurrence of her husband, of real property conveyed or devised to her in fee.

Revised Statutes.	*Real Property Law.*
Id., § 81. Where an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate, for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts.	§ 129. Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and encumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts.
Id., § 82. Where a like power of disposition shall be given to any person to whom no particular estate is limited, such person shall also take a fee, subject to any future estates that may be limited thereon, but absolute, in respect to creditors and purchasers.	§ 130. Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers and encumbrancers.
1 R. S. 733, § 83. In all cases, where such power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee shall be entitled to an absolute fee.	§ 131. Where such a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee.
Id., § 84. Where a general and beneficial power, to devise the inheritance, shall be given to a tenant for life or for years, such tenant shall be deemed to possess an absolute power of disposition, within the meaning and subject to the provisions of the three last preceding sections.	§ 132. Where a general and beneficial power to devise the inheritance is given to a tenant for life, or for years, such tenant is deemed to possess an absolute power of disposition within the meaning of and subject to the provisions of the last three sections.
Id., § 85. Every power of disposition shall be deemed absolute, by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee, for his own benefit.	§ 133. Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute.
Id., § 86. Where the grantor in any conveyance shall reserve to himself, for his own benefit, an absolute power of revocation, such grantor shall still be deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.	§ 125. Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.
Id., § 87. A special and beneficial power may be granted,	§ 123. A special and beneficial power may be granted,

Revised Statutes.	*Real Property Law.*
1. To a married woman, to dispose, during the marriage, and without the concurrence of her husband, of any estate less than a fee, belonging to her, in the lands to which the power relates ;	1. To a married woman, to dispose, during the marriage, and without the concurrence of her husband, of any estate less than a fee, belonging to her, in the property to which the power relates ; or,
2. To a tenant for life of the lands embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life.	2. To a tenant for life, of the real property embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life ; and such a power is valid to authorize a lease for that period but is void as to the excess.
Id , § 88 The power of a tenant for life to make leases, is not assignable as a separate interest, but is annexed to his estate, and will pass (unless specially excepted) by any conveyance of such estate. If specially excepted in any such conveyance it is extinguished.	§ 135. The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate, and passes by a grant of such estate unless specially excepted. If so excepted, it is extinguished. Such a power may be released by the tenant to a person entitled to an expectant estate in the property, and shall thereupon be extinguished.
Id., § 89. Such power may be released by the tenant to any person entitled to an expectant estate in the lands, and shall thereupon be extinguished.	
Id., § 90. A mortgage executed by a tenant for life having a power to make leases, or by a married woman, by virtue of any beneficial power, does not extinguish or suspend the power ; but the power is bound by the mortgage, in the same manner as the lands embraced therein.	§ 136. A mortgage executed by a tenant for life, having a power to make leases, does not extinguish or suspend the power ; but the power is bound by the mortgage in the same manner as the real property embraced therein, and the effects on the power of such lien by mortgage are :
Id., § 91. The effects of such a lien by mortgage on the power are,	
1. That the mortgagee is entitled, in equity, to an execution of the power, so far as the satisfaction of his debt may require :	1. That the mortgagee is entitled to an execution of the power so far as the satisfaction of his debt requires ; and,
2. That any subsequent estate created by the owner, in execution of the power, becomes subject to the mortgage, in the same manner as if in terms embraced therein.	2. That any subsequent estate, created by the owner, in execution of the power, becomes subject to the mortgage as if in terms embraced therein.
1 R. S. 733, § 92.	See *ante*, under 1 R. S. 732, § 79.
1 R. S. 734, § 93. Every special and	§ 139. A special and beneficial power

Revised Statutes.	*Real Property Law.*
beneficial power is liable, in equity, to the claims of creditors, in the same manner as other interests that cannot be reached by an execution at law, and the execution of the power may be decreed for the benefit of the creditors entitled.	is liable to the claims of creditors in the same manner as other interests that cannot be reached by execution; and the execution of the power may be adjudged for the benefit of the creditors entitled.
Id., § 94. A general power is in trust, when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from the alienation of the lands, according to the power.	§ 117. A general power is in trust, where any person or class of persons, other than the grantee of the power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from its execution.
Id., § 95. A special power is in trust, 1. When the disposition which it authorizes, is limited to be made to any person or class of persons, other than the grantee of such power. 2. When any person or class of persons, other than the grantee, is designated as entitled to any benefit from the disposition or charge authorized by the power. (As amended L. 1830, ch. 320.)	§ 118. A special power is in trust, where either: 1. The disposition or charge which it authorizes is limited to be made to a person or class of persons, other than the grantee of the power; or, 2. A person or class of persons, other than the grantee, is designated as entitled to any benefit, from the disposition or charge authorized by the power.
Id., § 96. Every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity for the benefit of the parties interested. *Id.*, § 97. A trust power does not cease to be imperative, where the grantee has the right to select any, and exclude others of the persons designated as the objects of the trust.	§ 137. A trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled for the benefit of the person interested. A trust power does not cease to be imperative where the grantee has the right to select any, and exclude others, of the persons designated as the beneficiaries of the trust.
Id., § 98. Where a disposition under a power is directed to be made to, or among or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated, shall be entitled to an equal proportion.	§ 138. Where a disposition under a power is directed to be made to, among, or between, two or more persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion; but when the terms

Revised Statutes.	*Real Property Law.*
Id., § 99. But when the terms of the power import that the estate or fund is to be distributed between the persons so designated, in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons, in exclusion of the other.	of the power import that the estate or fund is to be distributed among the persons so designated, in such manner or proportions as the grantee of the power thinks proper, the grantee may allot the whole to any one or more of such persons in exclusion of the others.
Id., § 100. If the trustee of a power, with the right of selection, shall die, leaving the power unexecuted, its execution shall be decreed in equity for the benefit equally of all the persons designated, as objects of the trust.	§ 140. If the trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as beneficiaries of the trust.
Id., § 101. Where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be exercised, its execution shall devolve on the court of chancery.	§ 141. Where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution devolves on the Supreme Court.
Id., § 102. The provisions contained in the second Article of this Title, from section sixty six to section seventy-one both inclusive, in relation to express trusts and trustees, shall apply equally to powers in trust, and the grantees of such powers.	§ 162. Sections ninety one to ninety-three of this chapter, both inclusive, in relation to express trust estates, and the trustee thereof, apply equally to trust powers, however created, and to the grantees of such powers.
1 R. S. 735, § 103. The execution in whole or in part, of any trust power, may be decreed in equity, for the benefit of the creditors or assignees of any person entitled as one of the objects of the trust, to compel its execution, when the interest of the objects of such trust is assignable.	§ 142. The execution, wholly or partly, of a trust power may be adjudged for the benefit of the creditors or assignees of a person entitled as a beneficiary of the trust, to compel its execution, where his interest is assignable.
Id., § 104. Every beneficial power, and the interest of every person entitled to compel the execution of a trust power, shall pass to the assignees of the estate and effects of the person in whom such power or interest is vested, under any assignment authorized by the provisions of the fifth Chapter of this Act.	§ 144. A beneficial power, and the interest of every person entitled to compel the execution of a trust power, shall pass, respectively, to a trustee or committee of the estate of the person in whom the power or interest is vested, or an assignee for the benefit of creditors.
Id., § 105. The grantor in any conveyance, may reserve to himself any	§ 124. The grantor in a conveyance may reserve to himself any power,

Revised Statutes.	*Real Property Law.*
power, beneficial or in trust, which he might lawfully grant to another; and every power thus reserved, shall be subject to the provisions of this Article, in the same manner as if granted to another.	beneficial or in trust, which he might lawfully grant to another; and a power thus reserved, shall be subject to the provisions of this article, in the same manner as if granted to another.
Id., § 106 A power may be granted, 1. By a suitable clause contained in a conveyance of some estate in the lands, to which the power relates; 2. By a devise contained in a last will and testament.	§ 120. A power may be granted either: 1. By a suitable clause, contained in an instrument sufficient to pass an estate in the real property, to which the power relates; or, 2. By a devise contained in a will.
Id., § 107. Every power shall be a lien or charge upon the lands which it embraces, as against creditors and purchasers in good faith and without notice, of or from any person having an estate in such lands, only from the time the instrument containing the power shall be duly recorded. As against all other persons, the power shall be a lien from the time the instrument in which it is contained, shall take effect.	§ 127. A power is a lien or charge on the real property which it embraces, as against creditors, purchasers and encumbrancers in good faith and without notice, of or from a person having an estate in the property, only from the time the instrument containing the power is duly recorded. As against all other persons, the power is a lien from the time the instrument in which it is contained takes effect.
Id., § 108 Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it, is granted or reserved in the instrument creating the power.	§ 128. A power, whether beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument creating the power.
Id., § 109. A power may be vested in any person capable in law of holding, but cannot be exercised by any person not capable, of aliening lands, except in the single case mentioned in the next section.	§ 121. A power may be vested in any person capable in law of holding, but cannot be exercised by a person not capable of transferring real property.
Id., §§ 110, 111.	Repealed in 1896.
Id., § 112. Where a power is vested in several persons, all must unite in its execution; but if previous to such execution, one or more of such persons shall die, the power may be executed by the survivor or survivors.	§ 146. Where a power is vested in two or more persons, all must unite in its execution; but if before its execution, one or more of such persons dies, the power may be executed by the survivor or survivors.
Id., § 113. No power can be execut-	§ 145. A power can be executed only

Revised Statutes.	*Real Property Law.*
ed except by some instrument in writing, which would be sufficient in law to pass the estate or interest intended to pass under the power, if the person executing the power were the actual owner.	by a written instrument, which would be sufficient to pass the estate, or interest, intended to pass under the power, if the person executing the power were the actual owner.
1 R. S. 736, § 114. Every instrument, except a will, in execution of a power, and although the power may be a power of revocation only, shall be deemed a conveyance within the meaning, and subject to the provisions, of the third Chapter of this Act.	See Real Prop. L., §§ 205, 240.
Id., § 115. Where a power to dispose of lands is confined to a disposition by devise or will, the instrument of execution must be a will duly executed, according to the provisions of the sixth Chapter of this Act.	§ 147. Where a power to dispose of real property is confined to a disposition by devise or will, the instrument must be a written will, executed as required by law.
Id., § 116. Where a power is confined to a disposition by grant, it cannot be executed by will, although the disposition is not intended to take effect until after the death of the party executing the power.	§ 148. Where a power is confined to a disposition by grant, it cannot be executed by will, although the disposition is not intended to take effect until after the death of the person executing the power.
Id., § 117.	Repealed, 1896. See Real Prop. L., § 251.
Id., § 118. Where the grantor of a power shall have directed or authorized it to be executed by an instrument not sufficient in law to pass the estate, the power shall not be void, but its execution shall be governed by the rules before prescribed in this Article.	§ 149. Where the grantor of a power has directed or authorized it to be executed by an instrument not sufficient in law to pass the estate, the power is not void, but its execution is to be governed by the provisions of this Article.
Id., § 119. Where the grantor shall have directed any formalities to be observed in the execution of the power, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formalities shall not be necessary to a valid execution of the power.	§ 150. Where the grantor of a power has directed any formality to be observed in its execution, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formality is not necessary to the valid execution of the power.
Id., § 120. Where the conditions an-	§ 151. Where the conditions annexed

Revised Statutes.	*Real Property Law.*
nexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power.	to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power.
Id., § 121. With the exceptions contained in the preceding sections, the intentions of the grantor of a power, as to the mode, time and conditions of its execution, shall be observed, subject to the power of the court of chancery, to supply a defective execution, in the cases hereinafter provided.	§ 152. Except as provided in this Article, the intentions of the grantor of a power as to the manner, time and conditions of its execution must be observed; subject to the power of the Supreme Court, to supply a defective execution as provided in this article.
Id., § 122. When the consent of a third person to the execution of a power is requisite, such consent shall be expressed in the instrument by which the power is executed, or shall be certified in writing thereon. In the first case, the instrument of execution, in the second, the certificate, shall be signed by the party whose consent is required; and to entitle the instrument to be recorded, such signature must be duly proved or acknowledged, in the same manner as if subscribed to a conveyance of lands.	§ 153. Where the consent of the grantor or a third person to the execution of a power is requisite, such consent shall be expressed in the instrument by which the power is executed, or in a written certificate thereon. In the first case, the instrument of execution, in the second, the certificate, must be subscribed by the person whose consent is necessary; and to entitle the instrument to be recorded, such signature must be acknowledged or proved and certified in like manner as a deed to be recorded.
1 R. S. 737, § 123. No disposition, by virtue of a power, shall be void in law or in equity, on the ground that it is more extensive than was authorized by the power; but every estate or interest so created, so far as embraced by the terms of the power, shall be valid.	§ 157. A disposition or charge by virtue of a power is not void on the ground that it is more extensive than was authorized by the power; but an estate or interest so created, so far as embraced by the terms of the power, is valid.
Id., § 124. Every instrument executed by the grantee of a power, conveying an estate or creating a charge, which such grantee would have no right to convey or create, unless by virtue of his power, shall be deemed a valid execution of the power, although such power be not recited or referred to therein.	§ 155. An instrument executed by the grantee of a power, conveying an estate or creating a charge, which he would have no right to convey or create, except by virtue of the power, shall be deemed a valid execution of the power, although the power be not recited or referred to therein.

Revised Statutes.	*Real Property Law.*
Id., § 125. Instruments in execution of a power are affected by fraud, both in law and equity, in the same manner as conveyances by owners or trustees.	§ 161. An instrument in execution of a power is affected by fraud, in the same manner as a conveyance or will, executed by an owner or by a trustee.
Id., § 126. Lands embraced in a power to devise, shall pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power, shall appear, expressly or by necessary implication.	§ 156. Real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication.
Id., § 127. Every estate or interest given by a parent to a descendant, by virtue of a beneficial power, or of a power in trust with a right of selection, shall be deemed an advancement to such descendant, within the provisions of the second Chapter of this Act.	§ 295. An estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust, with a right of selection, is an advancement.
Id., § 128. The period during which the absolute right of alienation may be suspended, by any instrument in execution of a power, shall be computed, not from the date of such instrument, but from the time of the creation of the power.	§ 158. The period during which the absolute right of alienation may be suspended, by an instrument in execution of a power must be computed, not from the date of such instrument, but from the time of the creation of the power.
Id., § 129. No estate or interest can be given or limited to any person, by an instrument in execution of a power, which such person would not have been capable of taking, under the instrument by which the power was granted.	§ 159. An estate or interest cannot be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power.
Id., § 130.	Repealed, 1896.
Id., § 131. Where the execution of a power in trust shall be defective, in whole or in part, under the provisions of this Article, its proper execution may be decreed, in equity, in favor of the persons designated as the objects of the trust.	§ 143. Where the execution of a power in trust is defective, wholly or partly, under the provisions of this article, its proper execution may be adjudged in favor of the person designated as the beneficiary of the trust.
Id., § 132. Purchasers for a valuable consideration, claiming under a defective execution of any power, shall be	§ 160. A purchaser for a valuable consideration, claiming under a defective execution of a power, is entitled to

Revised Statutes.	*Real Property Law.*
entitled to the same relief in equity, as similar purchasers, claiming under a defective conveyance from an actual owner.	the same relief as a similar purchaser, claiming under a defective conveyance from an actual owner.
Id., § 133. Where a power to sell lands, shall be given to the grantee, in any mortgage or other conveyance intended to secure the payment of money, the power shall be deemed a part of the security, and shall vest in, and may be executed by any person, who, by assignment or otherwise, shall become entitled to the money so secured to be paid.	§ 126. Where a power to sell real property is given to a mortgagee, or to the grantee in any other conveyance intended to secure the payment of money, the power is deemed a part of the security, and vests in, and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid.
1 R. S. 738, § 134.	See *ante*, under 1 R. S. 732, § 73.
1 R. S. 738, § 135. The term "grantor of a power," is used in this Article as designating the person by whom a power is created, whether by grant or devise; and the term "grantee of a power," is used as designating the person in whom a power is vested, whether by grant, devise or reservation.	§ 112. The word "grantor" is used in this Article, in connection with a power, as designating the person by whom the power is created, whether by grant or by devise; and the word "grantee" is so used as designating the person in whom the power is vested, whether by grant, devise or reservation.

TABLE OF INDEX TOPICS.*

ABSOLUTE POWER
ACCOUNTING
ACCUMULATION
ACKNOWLEDGMENT
ACQUIESCENCE
ACTIONS
ADVANCEMENT
ALIEN
ALLOWANCES
ANNUITY
APPLY
APPOINTMENT
APPORTIONMENT
ASSETS
ASSIGNMENT
ATTEMPTED TRUSTS
BENEFICIAL POWERS
BENEFICIARY
BENEVOLENT
BOND; SURETIES
CAPITAL
CHAMPERTY
CHARGE
CHARITABLE USES
CHILD-BEARING
CHILDREN
CLOUD ON TITLE
COMMISSIONS
CONDITIONS
CONFLICT OF LAWS
CONSENT
CONSIDERATION
CONSTRUCTION
CONTRAVENTION
CORPORATION
CORPUS
COSTS AND SECURITY
COUNSEL
COURT
COVENANTS
CREATOR OF TRUST
CREDITOR
CURTESY
CY PRES
DEBTOR
DECLARATION OF TRUST
DECREE
DEED
DEFAULT
DEFECTIVE EXECUTION
DEFICIENCY
DEFINITIONS
DELEGATION OF POWERS
DELIVERY
DESCENDANT
DEVISE
DISCRETION
DIVORCE
DONEE
DONEE OF POWER
DONOR
DOWER
DRUNKARD
EDUCATIONAL
EJECTMENT
ELECTION
ENTIRETY
EQUITABLE CONVERSION
ESTATE
ESTOPPEL
EXCESSIVE EXECUTION
EXECUTION OF POWERS
EXECUTOR
EXPRESS TRUST
FAILURE TO RECITE
FEE
FORECLOSURE
FRAUD
GENERAL ASSIGNMENT
GIFT
GRANT
HABENDUM
HEIRS
IDIOT
IMPERATIVE POWER
INCOME
INFANT
INJUNCTION
INSURANCE
INTEREST
INVESTMENTS
ISSUE
JUDGMENT
JUDICIAL CONTROL
LACHES
LAPSE
LEASING
LEGACY
LEGISLATIVE CONTROL
LIFE TENANT
LIMITATIONS
LUNATIC
MAINTENANCE
MARRIED WOMAN
MERGER
MORTGAGE
MORTGAGEE
NEXT EVENTUAL ESTATE
NEXT OF KIN
NOTICE
PARTIES
PARTITION
PASSIVE TRUST
PERSONAL PROPERTY
POWER OF ALIENATION
POWERS
POWERS IN TRUST
PRECATORY
PUBLIC POLICY
PURCHASER
PURPOSE
RECORDING
REFUNDING
RELATIONS
RELEASE

(Continued on next page.)

* The following cases, published too late for insertion in the text, are referred to in the Index, and relate to the following topics: *Bigelow* v. *Tilden*, Daily L J., Jan. 5, 1897, p. 1, to Charities, Execution of Powers, Investments, Power of Sale, Deficiency, Separate Shares; *Duryea* v. *Mackey*, 151 N. Y. 204, to Mortgage of Decedent's Realty; Mortgage by Life Tenant; *Matter of Garth*, 10 App. Div. 100, to Double Commissions, Authority to change Investments, Former Adjudication, Effect of Surrogate's Decree; *Edson* v. *Bartow*, 10 App. Div. 104, to Secret Trusts, Indefiniteness, Devolution when Trust Void, Former Adjudication.

Religious
"Religious person"
Remainder
Remedies
Removal
Rents, profits and income
Renunciation
Res adjudicata
Reservation of power
Residuary clause
Resignation
Reversion
Revocation
Sale
Savings bank deposits
Seal
Secret trusts
Security
Separability
Separate shares
Specific performance
Spendthrift
Statutes
Sureties
Surplus
Surrogate
Survivor
Suspension
Tax
Tenancy
Termination
Testamentary trustee
Third parties
Time
Title
Trust
Trust company
Trustee
Trust property
Trust term
Unborn child
Use
Usury
Vendee
Vested estates
Vested rights
Void
Waiver
Widow
Wife
Will
Witness to will

INDEX.

The references are to pages.

ABSOLUTE POWER TO DISPOSE. See BENEFICIAL POWER; POWER IN TRUST; SUSPENSION; TRUST TERM.
requirement of another's consent negatives, see EXECUTION OF POWERS (3).

ACCOUNTING See SURROGATE; EXECUTOR.
(1) *In general.*
jurisdiction; equity, surrogate, 157–159.
who may require, 149, 164, 288.
by person both executor and trustee, 159, 166.
by executor with a power, 163, 164, 485.
by executor of deceased trustee, 163, 165, 187, 188.
by executor of trustee appointed by Supreme Court, 166.
trustee may require from co-trustee, 166.
requiring account from trust company, 159, note.
when separate accounts for separate funds, 159.
trust instrument cannot dispense with accounting, 159.
ratification after majority by infant, 160.
accounting and "account stated," 160.
trustee's admission of correctness of account, effect, 160.
failure to cite necessary parties, 265.
accounting, on application to relieve sureties, L. 1881, ch. 654
if *cestui* allowed to occupy, effect on accounting, 357.
recitals of service, effect, 169.
trustee must preserve proof of service, 169.
decree covers prior accounts, 169.
counsel fees, see ALLOWANCES.
(2) *In the Supreme Court*, 159–161.
general jurisdiction, parties, 159, 160.
not entitled to jury trial, 160.
assignee of party, when bound by decree, 160.
agreement, pending suit, to compromise, 160.
settlement out of court, 160.
accounting demanded by defendant, 161.
account may be voluntary or compulsory, 161.
trustee defendant cannot attack trust, 161.
may allege plaintiff has no interest, 161.
(3) *In the Surrogate's Court*, 161–169.
uncorrected code references, how construed, 642, note.
accounts voluntary or compulsory, 161–166.
intermediate accounting, 162–166.
judicial settlement, 162–166.
final account—meaning, 162.
voluntary, intermediate, 162.
voluntary, judicial settlement, 162–163.
effect of decree, 162–163.
compulsory, intermediate, 163–166.

The references are to pages.

ACCOUNTING—*Continued.*
compulsory, judicial settlement, 164–166.
supplemental account, 166.
controversy over right to share, 168.
ACCUMULATION. See PURPOSE.
ACKNOWLEDGMENT OR PROOF, 29, 36, 42, 66
ACQUIESCENCE. See ESTOPPEL
ACTIONS. See PARTIES; TRUSTEE (4); DECREE; BENEFICIARY.
(1) *In general.*
between trustee and debtor, offsets 232.
relating to secret, constructive, and implied trusts, 402–405.
judgment against life tenant subject to trust power, 459.
purchaser at execution sale, 459.
title of cut off by exercise of power, 459.
judgment does not attach to what, see DONEE (2); TRUSTEE (5).
not to possible interest of grantor of fee to trustee, see PURPOSE (1) *b*.
as to judgments, in general, see THIRD PARTIES (1).
(2) *Partition.* See PARTITION.
effect on of equitable conversion, 448–450.
of land subject to power of sale, 448–450.
effect of trust, 118.
of remainder after trust, consent of trustee, 449, 654.
title, not determined by surrogate's decree, 264, 600.
as evidence of election, see TERMINATION (2).
when trustee may seek, 450.
parties, 118.
(3) *Injunction.*
pending release of sureties, L. 1881, c. 654, § 6.
remainderman when entitled to, 170.
cestui when entitled to, 260
(4) *Specific performance*, 114, 260, 261, 399, 511.
whether donee to sell may convey to testator's vendee, 516–517.
when court may direct conveyance, see JUDICIAL CONTROL.
by and against donee of power, see POWERS (4)
by and against trustee, see POWERS (4).
parties, 114.
(5) *Foreclosure*, 116, 147, 260, 291, 293, 313, 523.
See MORTGAGE.
parties, 116, 291, 293.
(6) *Ejectment.*
by trustee against *cestui*, 357.
by and against donee of power, see POWERS (4).
against trustee, 118.
parties, 118.
(7) *Creditors' bill*, 410, 586, 587.
See THIRD PARTIES.
ADVANCEMENT. See BENEFICIARY.
ALIEN as trustee, 69–71.
as beneficiary, 246, 247.
as creator of trust, see TRUSTS (4).
as donor of power, see POWERS (3).
as *cestui* of passive trust, 397.
alienage, ground for removing trustee, 70, 71.
power to sell and pay proceeds to alien, 506.
ALLOWANCES FOR EXPENSES, 208, 231–235.
See COSTS; COMMISSIONS.
none for trustee's services, 231.
what expenses allowed for, 231–235.
when may employ assistants, illustrations, 231–235.

The references are to pages.

ALLOWANCES FOR EXPENSES—*Continued.*
whom may thus employ, 232–234.
for protection of estate, 232.
for travelling expenses, 232.
for office rent and expenses, 232.
for counsel fees, 208–209, 233–235.
amount of counsel fees, 233–235.
not confined to statutory costs, 233.
on accounting, 233, 235.
attorney not confined to the allowance, 234.
he may hold trustee liable, 234.
allowance for advances, 235.
when for interest on advances, 235.
when expenses charged to corpus, see RENTS AND PROFITS (3) (4).
ANNUITY. See ASSIGNMENT BY BENEFICIARY (1) *b*; TRUST (3).
does not necessitate trust, 383.
direction to executor to pay, 383.
or, direct legacy in instalments, 383.
or legacy may be charged on property, 383–384.
or imposed on a legatee as a condition, 384.
or power to pay them, 504.
apportionment of annuities, see RENTS AND PROFITS (6).
from when and to when computed, see RENTS AND PROFITS (7).
APPLY. See RENTS AND PROFITS.
APPOINTMENT, POWER OF. See BENEFICIARY; EXECUTION OF POWERS (1), (6), (7), (9); POWERS IN TRUST; RENTS AND PROFITS (7).
APPORTIONMENT of rents, annuities, outlays, charges, see RENTS AND PROFITS (2)–(7).
between co-tenants, 340.
ASSETS. See EXECUTOR
ASSIGNMENT BY BENEFICIARY. See LEGACY; ANNUITY; ESTOPPEL.
(1) *Under the Revised Statutes*, 377–386.
(*a*) Non-assignable interests, 378–380.
purpose of statute forbidding assignment, 378–379.
to what trusts applicable, 378.
scope of statute, 378.
if *cestui* borrows trust fund and buys land, 379.
and gives trustee mortgage thereon, 147, 379.
here *cestui* owns land and may sell it, 379.
the mortgage represents the trust, 147, 379.
cestui may consent to change of investments, 379.
may agree with testator to release claim on rents, 384.
statute does not apply to power in trust, 379.
nor to assignment of accrued income, 379.
if *cestui* assigns, not estopped to repudiate, 379.
assignment under void trust, effect, 385.
various illustrations of disability, 379.
cestui's order on trustee, when protects latter, 379–380.
(*b*) assignable interests, 380–385.
scope and meaning of statute, 380.
sums in gross were assignable, 304, 378, 380.
covered creditors' claims, legacies, and charges, 288, 290, 380.
right to gross sums might be unassignable 380.
as, to apply corpus if and as needed, etc, 380.
assignment of annuities, gross sums, 380–384.
these terms discussed, 380–384.
when assignable and when not, 380–384.
See ANNUITY; LEGACY.
gross sum and rents distinguished, 304, 384.

The references are to pages.

ASSIGNMENT BY BENEFICIARY—*Continued.*
test, under Rev. Stat., stated, 384.
same statute applied to personalty, 384.
trust to accumulate gross sum, when valid, 304.
cestui's acquiescence in trustee's wrongful acts, 182.
same, release of trustee by *cestui*, 182.
trust, how granted or assigned, 28, note.
cestui as remainderman, result, 386, 418–419.
may then release, and extinguish trust, 386, 418–419.
(2) *Under the Real Property Law*, 385–386.
change in test, 385–386.
what now assignable, 385–386.
gross sum no longer the test, 385–386.
ATTEMPTED EXPRESS TRUSTS, 395–409.
See PURPOSE; TRUSTS.
(1) *First group. Valid express trusts*, 395.
defined, 395.
purposes, 282–311, 395.
what trusts prohibited, 6–10, 101, 282–283, 395.
(2) *Second group. Valid as powers*, 26, 395–396.
because purpose not statutory, 395–396, 438–440.
because trustee not empowered to receive rents, 396, 438–440.
trustee takes a mere power, 396.
general discussion, 438–443.
illustrations, 438–443.
(3) *Third group. Passive trusts*, 5, 396–399.
cestui entitled to possession and rents, 396–399.
title vests directly in *cestui*, 396–399.
illustrations, 352–376, 397–398.
trust reserving power to revoke, 356.
such distinguished from passive trust, 356.
"in trust" merely, when good as to third parties, 130.
in trust merely, no *cestui*, remainder over, result, 253, 398.
in trust for B, and mortgage back by grantee, 397.
B takes only the equity, 397.
the two instruments are one, 397.
passive trust, when *cestui* takes no title, 397.
passive trust, *cestui* not entitled to conveyance, 398.
the statute invests him with title, 398.
trust to convey in future, 398.
whether conveyance then requisite, 397, 398, 498.
See BENEFICIARY.
transfer to "trustee," naming no *cestui*, 398.
term "trustee" as *descriptio personæ*, 398.
when such trustee may convey title, 398.
transfer to A "as trustee," 398–399.
if then no *cestui*, result, 398–399.
grantor cannot then attack transfer, 398–399.
court may assume there was valid trust, 399.
may compel purchaser to accept title, 399.
purchaser from such trustee, 399.
(4) *Fourth group. Valid as charge*, 399.
See CHARGE.
absolute title vests in grantee, 399.
subject to a charge, 399.
or grantee bound as by contract, 399.
illustrations, 12–15, 399.
(5) *Fifth group. Void trusts*, 400–402.
five classes examined, 400–402.

The references are to pages.

ATTEMPTED EXPRESS TRUSTS—*Continued.*
indefinite beneficiaries, 400.
trust to enforce forfeiture, 400.
essentials absent, 400.
promise to give in trust, 400.
though trust void, heirs may perfect it, 401.
indefinite trust, 17, 401.
is void as trust and void as power, 401.
power like trust must be definite, 401.
attempted trust in land not owned by grantor, 401.
(6) *Sixth group. Secret trusts*, 6, 36, 402–405, 654, 681 note.
trustee *ex maleficio*, 402.
precatory trusts, 16, 17, 18, 24, 255, 402–403.
whether absolute, or secret trust, test, 255, 402–403.
forms of proceedings raising question, 403–404.
in proceeding for "construction," what court, 403.
in probate proceeding, when, scope, court, 403.
in suit alleging fraud, when, court, 403–404, 681 note.
illustrations, what evidence admitted, 403–404.
suit to enforce secret trust, 404.
L. 1860, ch. 360, devise or bequest to charity, 404.
not more than half testator's estate, when, 404.
L. 1848, ch. 319, § 6, devise or bequest to charity, 405.
will executed two months before decease, 405.
secret trusts to evade these statutes, 405.
if such devise or bequest absolute on face, 404–405.
whether precedent oral trust void, 404–405.
whether wife, etc., may waive this objection, 404-405.
whether others may object, 404–405.
whether secret oral trust "testamentary," 405, note.
absolute devise or bequest, oral trust, 405, note.
several classes examined, 405, note.
(7) *Seventh group. Void as to third parties*, 249, 252, 406.
See THIRD PARTIES.
(8) *Devolution of title*, 406–409.
if trust fails, who benefits, 406–409, 681 note.
trustee of, never takes beneficially, 406.
when trustee takes mere legal title, 407.
when he takes no title at all, 407.
when proposed beneficiaries take, 407–408.
when heirs, when residuary devisees, 407–408.
effect of residuary clause, 408–409.
residuary devise in trust, 409.
will guarding against invalidity of trust, 409.
by alternative gift on same trust, 409.
when this effective, 409.
trust failing in part, 409.
trustee may still take entire title, 102–409.
power invalid as to part, 409.
may still range over entire corpus, 409.

BENEFICIAL POWERS, 453–465.
See BENEFICIARY.
(1) *Defined*, 428.
creditors' rights, see THIRD PARTIES (1).
(2) *When they involve a fee*, 453–458.
general principles, 453.
merger of title and power, 453.
absolute power of disposition, 454–458.

The references are to pages.

BENEFICIAL POWERS—*Continued.*
absolute power defined, 454, 455.
absolute power and estate less than fee, 454–455.
absolute power and no particular estate, 455.
power to dispose by grant, when absolute, 455.
power to dispose by will, when absolute, 455.
testamentary power, when unessential, 455–456.
as to personal property, 455.
absolute power, rights of creditors, 456.
same, of purchasers, encumbrancers, 456.
same, of remaindermen, 456, 457.
absolute power, absolute remainder, 457.
in such case, trust power, 110, 457.
absolute power to sell and consume, 457, 474.
See *infra* (3).
and remainder of what is left, 457, 461–464, 474.
power to sell, limited power to consume proceeds, 457, 461–464.
absolute power reserved, 458.
absolute power, what estate in donee, 458.
(3) *When fee not involved*, 459–465.
See Power in Trust.
life estate and power both in trust, 459.
beneficial life estate, power in trust, 459.
judgment against life tenant, 459.
judgment sale subject to trust power, 459.
execution of power cuts off judgment purchaser, 459.
encumbrance placed by life tenant, 459.
is subject to exercise of trust power, 459.
title in trustee, power in beneficiary, 459–460.
trust life estate and beneficial power in same person, 460.
trust estate, power in settler to revoke, 460.
mere power and no title, 460.
devise, subject to power in executors, 460.
when such power beneficial, 460.
when in trust, 460.
when held by executors as such, 460, 489–491.
See Donee (2) *e*.
life estate in one, power in another, 460.
conditional beneficial power, 461.
title in life tenant, power to consume, 110, 457, 461–464.
See *supra* (2); Life Tenant; Remainder; Rents and Profits (9).
remainder over of what not consumed, 110, 461.
standing of such a remainder, 461–464.
conditional right to consume, 461–462.
trust, power to apply corpus, 462.
remainder in what is not applied, 462.
remainder if power not exercised, 462–464, 563.
remainder if proceeds not consumed, 462–464.
See Remainder; Life Tenant.
such remainders in personalty, 463.
whether power to sell and consume is in trust, 110, 463.
whether power to sell and consume is one or two powers, 463.
such "remainders," meaning, 463–464.
gift in fee, repugnant devise over, 464, 553.
absolute devise, invalid restrictions, 464.
to consume, implies power to sell in fee, 464.
tenancy in undivided share, 464–465.
power in tenant of one share, 464–465.

The references are to pages.

BENEFICIAL POWERS—*Continued.*
when carries fee in that share, 464–465.
one share beneficial, another in trust, 464.
conveyance of share, under power, effect, 464–465.
power to sell on consent, 133, 465, 530–533.
BENEFICIARY.
(1) *In general.*
as agent of trustee, 232.
as surety for trustee, see BOND.
as trustee, see *infra* (2); TRUSTEE (1).
of passive trust, takes beneficial title, see ATTEMPTED TRUSTS (3), (8).
estoppel, see ESTOPPEL.
entitled to rents, see RENTS AND PROFITS (9).
no right to occupy trust land, see RENTS AND PROFITS (9).
but trustee may permit to do so, see RENTS AND PROFITS (9).
if entitled to both rents and possession, 355, 396–399.
such trust invalid, result, see RENTS AND PROFITS (9).
if *cestui* occupies, must pay taxes and interest, 357.
as to right to occupy, and results, see RENTS AND PROFITS (9).
as to compelling to occupy, see RENTS AND PROFITS (9).
(2) *Beneficiary of express trust.*
(*a*) Who may be, 246–250.
beneficiary also trustee, 17, 73–75, 80, 86.
See also TRUSTEE (1).
beneficiary as donee of power, 248, 459–465, 475.
beneficiary as trustee of remainder, 248.
may acquire remainder, during trust term, 248.
may then release and end trust, when, 386, 418–419.
See TERMINATION (1).
may have contingent remainder, 248.
on contingency of his death childless, 248.
cestui of future trust may own prior estate, 247, 248.
beneficiary under trust of one share, 248.
also remainderman in another share, 248.
"heirs" as beneficiaries, meaning, 250.
trust for "A and his heirs," meaning, 250.
(*b*) How to be designated, 24, 251–257.
must be a definite beneficiary, 22, 253, 309–311, 400.
indefiniteness in precatory trust, 17.
designation of beneficiary, 251.
illustrations of sufficient and insufficient, 24, 251–255, 387–394, 400, 401, 681 note.
no beneficiary at all, result, 252, 398, 399.
no beneficiary of power, result, 252, 253.
devise to A "in trust," remainder to B, 253, 398.
construed as life estate to A, remainder to B, 253, 398.
trust refers to implied trust to preserve remainder, 398.
trust for masses, names no beneficiary, 253.
no limit to number of beneficiaries, 255.
shifting succession of beneficiaries, 255.
willingness of trustee to designate, 251–256.
absolute gift, request as to beneficiaries, 255.
See ATTEMPTED TRUSTS (6).
under general assignment, 255.
charitable uses, effect of L. 1893, 256–257, 387–394.
charitable uses, effect of Real Prop. L., 256–257, 387–394.
religious, educational, benevolent uses, 256–257, 387–394.
(*c*) Title is equitable, see *infra*, *f*.

The references are to pages.

BENEFICIARY—*Continued.*
has no legal title, 290, 418.
See PURPOSE (1), *b*, *c*.
if also remainderman, no merger, 418.
(*d*) Beneficiary of specific share where separate fund set off, 257.
See SEPARATE TRUST SHARES.
(*e*) Tenancy, see TENANCY.
(*f*) Rights and remedies, 132, 160, 259–265.
right to assign beneficial interests, see ASSIGNMENT BY BENEFICIARY; REMAINDER; RELEASE; TERMINATION (1); PURPOSE (1) *b*; RENTS AND PROFITS (9); TRUSTEE; ESTOPPEL; JUDICIAL CONTROL.
always some remedy, 259
election among remedies, 259.
to compel execution of trust, 160, 260, 288.
trust enforced for *cestui* only, 260.
remedy against trustee, executor, 107.
against sureties, see BOND.
beneficiary's interest, 260–262.
beneficiary is equitable owner, 260–261.
inaccuracy of this term, 260.
he really owns obligation of trustee, 260.
property in thing, property in obligation, 260.
realizing ownership in obligation, 260.
only by compelling performance, 260.
his right is *in personam*, 261.
not strictly *in rem*, 261.
theory of trustee's obligation, 11, 261.
trust and debt distinguished, see TRUSTS (3).
remedy against removed trustee, see REMOVAL.
when beneficiary a trustee, 186.
and also responsible for loss, 186.
how fund then secured, 186.
solvency of trustee, effect on remedy, 260.
if *cestui* pays tax, entitled to receipt, 321.
when remedy in equity, 11, 132, 262.
scope of term "equity," 263.
includes Surrogate's Court, when, 263.
when remedy at law, 262.
when remedy in Surrogate's Court, 262.
trust as a contract, when, 11, 262.
following trust property, 263, 264, 288, 289.
tracing trust funds, 117, 263, 264.
does not waive other remedies, 263.
does not release trustee, 263.
following, before suit on bond, 263.
election to take substituted property, 264.
if property mingled, 264.
may elect to be co-owner, 264.
may hold trustee liable, 264.
tracing in Surrogate's Court, 264.
decree there, effect, 264.
does not establish legal title, 264, 600.
for example, in partition, 264.
right to refunding, 168, 264.
when others must refund to trust, 264, 654
when distributees need not, 264, 265.
recovering back commissions paid, 265.
fraud or duress inducing overpayment, 265.
voluntary adjustment of commissions, 265.
in such case, no refund, 265.

The references are to pages.

BENEFICIARY—*Continued.*
(3) *Beneficiary of power*, 494–501, 645.
See POWER; POWER IN TRUST; BENEFICIAL POWER; EXECUTION OF POWER.
who may be, 494.
designation of, in trust power, 251–255, 310–311.
See CHARITABLE USES.
donee's willingness to designate, effect, 251–255.
no beneficiary named, result, 252, 253.
donee of power as beneficiary, 494.
donee in trust conveying to himself, 494.
such act voidable; waiver, estoppel, 494.
waiver presumed when, 494.
trust power must be exercised for beneficiaries, 516, 517, 642–650.
beneficiaries under power to appoint, 251–255, 494.
See EXECUTION OF POWERS.
when all entitled equally, 494.
when donee may select and exclude, 494–495.
beneficiary may assign interest, 379.
death of donee with power to select, result, 495.
all then take equally, 495.
illusory appointments, 495.
appointment to non-beneficiaries, see EXECUTION OF POWERS (6), (7).
beneficiaries under power to pay, divide or convey, 495–500.
whether interest then vested or contingent, 495–500, 654, note.
whether necessary parties in actions, 496
power to pay, divide or convey, 496–500, 654.
power to convey future estate, effect on its vesting, 344, 497, 500.
limitation in default of execution, 497, 553–554.
See EXECUTION OF POWERS (9).
such may be vested, notwithstanding power, 497.
persons unascertained, contingent, 497–498.
postponed power to convey, vesting of future estate, 498, 654.
exercise of power to convey, when useless, 498.
partition, effect of power, parties, 498.
power to appoint commissioners to convey, 498.
trust to convey, title vests in beneficiary, 499.
imperative power, conversion, parties, 499–500.
equitable conversion, vesting, 500.
power to sell remainder after trust, 500.
power to fix time of payment, vesting, 500.
descendant as beneficiary, advancements, 500.
children, descendants, issue, 500.
relations, 501, 645.
foregoing and similar terms defined, 500–501, 645.
remedies of beneficiary, see EXECUTION OF POWERS; POWERS IN TRUST; BENEFICIAL POWERS; DONEE; JUDICIAL CONTROL.
BENEVOLENT. See CHARITABLE.
BOND, SURETIES. See REMOVAL.
when bond and mortgage accepted, 186.
devastavit, security to cover, 186.
using trust fund as collateral to secure, 193, 242.
in the Supreme Court, 185.
when required and when not, 185.
insolvency as ground for, 204.
if trust company trustee, 185.
in Surrogate's Court, 185, 241.
when required and when not, 185–186.
notice to parties, when, 186.

The references are to pages.

BOND, SURETIES—*Continued.*
effect of failure to give bond, 241–243.
sureties, 78, 186–195, 260.
remedies against, 187–195.
when accounting a prerequisite, 190–191.
bond not filed, result, 190.
sureties privies of trustee, 78, 191–193
when bond by decree against trustee, 191–192.
when liable for fine on trustee, 192.
when surety may impeach decree, 192.
cannot attack trustee's appointment, 78.
if trust void, sureties not liable, 192.
application for new surety, 192, L. 1881, c. 654.
" qualification" by surety, 192.
surety's application to be relieved. L. 1881, c. 654, 194, 195.
injunction thereon, L 1881, c. 654, § 6.
cestui's release, waiver, estoppel, 192, 193.
See ESTOPPEL.
release by surrogate, 194, 195.
release of one surety, 194.
sureties on illegal bond, 192, 193.
trustee's default before bond, 193.
pledging trust estate to sureties as collateral, 193.
sureties' compensation, 193.
surety, when relation not fiduciary, 194.
if trustee is also executor, 194.
for what acts surety then liable, 194.
suing both sureties, judgment against one, 194.
beneficiary as surety, 195.
bond joint and several, meaning, 199.
sureties on appeal security, 210–211.
sureties of donee of power, see POWERS IN TRUST.

CAPITAL distinguished from income, see RENTS AND PROFITS (2).
trust or power to apply corpus, see RENTS AND PROFITS (9).
or to use to make up deficiency, see RENTS AND PROFITS (9).
CHAMPERTY, transfer of land not in possession, to trustee, 433, 473, 599.
CHARGE. See ASSIGNMENT BY BENEFICIARY (1) *b*; DONEE (2) *b*; TRUST (3).
attempted trust, when valid as charge. 12–15, 399.
power to charge, see PURPOSE (2).
CHARITABLE USES AND TRUSTS, 387–394.
See CORPORATION.
(1) *Prior to May* 13, 1893, 388–392.
real property, 388–389.
personal property, 389–390.
powers in trust, 390–391, 478.
charitable trusts abolished, 388–389.
summary, 391.
exceptions, 391–392.
benevolent, and religious uses, 392.
educational, 392.
charitable corporation as trustee, 72, 73.
Act of 1892 quoted, 255.
(2) *Since May* 13, 1893, 392–394.
L. 1893, c 701 quoted, 392.
Real Prop. L., § 93 quoted, 392–393.
scope of these acts, 256, 257, 393–394.
do not affect vested rights, 257, 394.
direct gift to charitable corporation, 254, 387–388, 391.

The references are to pages.

CHARITABLE USES AND TRUSTS—*Continued.*
quasi-charitable trusts, 388–390.
court as trustee for charity, 257, 393.
duty of attorney-general, 393.
indefiniteness of beneficiaries, 251–257, 387–394, 681 note.
term not measured by lives, 393, 681 note.
statutes change public policy, 257.
(3) *More than half* testator's estate, see ATTEMPTED TRUSTS (6); TRUST PROPERTY.
(4) *Will less than two months* from testator's death, see ATTEMPTED TRUSTS (6): TRUST PROPERTY.
CHILD-BEARING, 250, 521.
CHILDREN, 500, 644, 645, 646.
See HEIRS; BENEFICIARY (3).
after-born, as beneficiaries, 250, 281.
effect on, of power in will, 401, 412, 524.
effect on, of devise, 401.
illegitimate, 250, 251, 645.
posthumous, 251, 645.
of beneficiary of trust, see THIRD PARTIES (2).
CLOUD ON TITLE, 446, 523, 601.
COMMISSIONS, 215–231.
historical, 215–217.
general statutory provision, 217.
applies to trustees, by analogy, 216, 231.
applies to testamentary trustees, 162, 216–218.
do not disqualify as witness to will, 73.
trustee may hold fund till commissions paid, 218.
applying commissions on claim against trustee, 218.
on what are commissions allowed, 218–231.
how computed, 219, 226.
up to what date computed, 219.
law in force when, governs, 219.
when to be taken, 226, 227, 229, 230.
special rate for trustees, for creditors, 216, 230, 231.
double commissions, when, 224, 225, 229.
when executor also trustee, 224–225, 681 note.
on sums of $100,000 or more, 225–226.
when full commission to each, 225–226.
when income exceeds $100,000, 225.
apportionment, 227, 229.
death, etc., of some of trustees, 226.
no extra allowances for trustee's services, 231.
See ALLOWANCES FOR EXPENSES.
trust instrument may allow extra, 227–229.
or make provision in lieu of, 228.
in such case, election between, 228.
when renunciation of commissions required, 228.
retraction of election, 228.
legacy to trustee, no election, 228.
right to elect, laches, 228.
provision for "reasonable," 228.
provision in general assignment, 228.
if removed, loses extra provision, 229.
will may provide against any commissions, 229.
such a meaning not favored, 229.
agreement for extra, when void, 141.
agreement to waive, 228.
voluntary adjustment of, 265.

The references are to pages.

COMMISSIONS—*Continued.*
assignment of, 227, 266.
on resigning, 229–230.
on removal, 229–230.
if decree denying removal reversed, 230.
how then to attack allowance of commissions, 230.
commissions in arrear on removal, 230.
recovering commissions overpaid, 265.
of donee of power, see DONEE (2).
commission, when charged to income or corpus, 322, 329.
CONDITIONS, upon exercise of power, see EXECUTION OF POWERS (1).
upon vesting of legacy, etc., see RENTS AND PROFITS (9).
CONFLICT OF LAWS, 629–635.
Real Property, 629–630.
Personal property, 630–635.
action here to annul trust, 631–633.
action for active assistance, 633–635.
public policy, as of what time, 634–635, 646.
CONSENT. See ESTOPPEL.
of third person, see EXECUTION OF POWERS (3).
CONSIDERATION. See TRUST (9).
in a trust for benefit of creator, 588.
CONSTRUCTION, 636–646.
See JUDICIAL CONTROL.
jurisdiction of the Supreme Court, 160, 636–640.
inherent, 160, 636–639.
incidental, 160, 639.
under Code, § 1866, 639–640.
jurisdiction of the surrogate, 640–641.
parties, 636–646.
statutory, 640.
incidental, 641.
res adjudicata, 641–642.
principles of construction, 642–646.
illustrations, special terms, 24, 26, 259, 519, 520, 521, 528, 642–646.
public policy, 634, 635, 646.
statutory construction, 642.
construction of terms in deed of trustee or donee, 510.
effect of Real Prop. L., on prior instruments, 284–285.
when essentials of trust implied, see TRUSTS (5).
CONTRAVENTION OF TRUST, sale, mortgage, see TRUSTEE (5); JUDICIAL CONTROL; LEGISLATIVE CONTROL.
lease, see LEASING; JUDICIAL CONTROL; LEGISLATIVE CONTROL.
CORPORATION. See CHARITABLE USES.
as trustee, 68, 71–73, 78.
charitable as trustee, 72, 73.
as beneficiary, 249, 250.
as remainderman after trust, 250.
taking absolutely subject to legacy, etc., 72, 249, 250.
or to annuity, 249, 250.
power to sell and pay proceeds to corporation, 506.
CORPUS. See CAPITAL.
COSTS AND SECURITY. See ALLOWANCES FOR EXPENSES.
trustee must pay costs on resigning, 239.
costs in actions, 205–211.
when trustee personally liable, 205–209, 654.
special order charging him, on notice, 206–209, 654.
when liable as trustee only, 205–211, 654.
appeal, as to disposition of costs, 207.

The references are to pages.

COSTS AND SECURITY.—*Continued.*
costs as between trustee and estate, 207.
when entitled to costs, 208.
when attorney entitled, 208.
attorney not confined to statutory costs, 233.
when trustee and attorney may divide, 208.
costs against trust fund, proportion, 208.
when trustee may recover costs from *cestui*, 492, note.
costs in special proceedings, 208–209.
extra allowances, 208, 239.
counsel fees, 208–209.
See ALLOWANCES FOR EXPENSES.
in Surrogate's Court, 208, 209, 211.
effect of appeal from, 209.
security for costs, 209–211.
COUNSEL.
(1) *Employing Counsel*, 126–128, 208, 209, 231–235.
by one of several trustees, 204.
(2) *Counsel fees.* See ALLOWANCES; COSTS.
(3) *Trustee acting as*, not allowed, when, 142, 242.
COURT. See JUDICIAL CONTROL.
COVENANTS. See EXECUTION OF POWERS (1); LEASING (2).
CREATOR OF TRUST as donee of power, 476.
as trustee, 76, 412.
as beneficiary, 249, 252, 587–588.
as trustee's agent, 232.
right to have trust enforced, 105.
when may attack transfer to trustee, 398, 399.
may convey property willed to trustee, 105, 516.
relation of, to trusts for creditors, see PURPOSE (1) *b*.
title, interest and rights of, see PURPOSE (1) *b*; TRUSTEE (3).
creator reserving right to occupy, 356.
See RENTS AND PROFITS (9).
creator's admissions, 43, 54.
conveyance by, after transfer to trustee, see TRUSTEE (3).
creator's declarations, 104.
CREDITOR. See THIRD PARTIES.
CURTESY. See THIRD PARTIES (5).
CY PRES, 423.

DEBTOR. See THIRD PARTIES.
trustee is not debtor of *cestui*, 160.
DEBTS. See THIRD PARTIES (6); PURPOSE.
debt and trust distinguished, 12–15, 35, 36.
See TRUST; BENEFICIARY.
DECLARATION OF TRUST. 27–67. See TRUST (7).
DECREE. See BOND; JUDGMENT; PARTIES; ACTION.
on accounting, 160. 162, 163, 169.
surrogate's decree, effect on title to land, 264, 600, 681 note.
res adjudicata, 120–123, 146, 181, 641, 642.
See TRUSTEE (4).
assignee when bound, 160.
DEED. See GRANT.
DEFAULT in execution of power, see EXECUTION OF POWERS (9).
DEFECTIVE EXECUTION. See EXECUTION OF POWERS (8).
DEFICIENCY in rents or corpus, see RENTS AND PROFITS (9).
in assets, see DONEE (2) *d*.
DEFINITIONS. See also the several index topics.
express trust, 11.

The references are to pages.

DEFINITIONS—*Continued.*
other trusts, see TRUSTS (3).
power, 424.
See POWER IN TRUST; BENEFICIAL POWER.
donor, 425.
donee, 425.
grantor of power, 425.
grantee of power, 425.
further definitions relating to powers, see POWERS (2).
real property, 28.
lands, 28.
estate, 28.
interest in, 28.
conveyanee, 28.
creation of estate, 279–280.
DELEGATION OF POWERS, donee by delegation, 476–477, 525, 530, 535, 536, 542, 552.
what powers may be delegated, 476–477.
what is not a delegation, 477.
mortgagee's power to sell passes to assignee, 477.
DELIVERY. See EXECUTION OF POWERS (1); REVOCATION; TRUSTS (3), (7), (8)
DESCENDANT. See BENEFICIARY.
DEVISE, general, when executes a power. See EXECUTION OF POWERS (5).
DISCRETION. See POWER IN TRUST (3).
in donee, see EXECUTION OF POWERS; DONEE (5); JUDICIAL CONTROL; INVESTMENTS
when court controls, 143, 362, 363, 367, 469–471.
scope of discretion, 143, 468–471.
what discretion in trusts to sell, etc., see PURPOSE (1) *b*, *f*.
in applying rents, see RENTS AND PROFITS (9).
in survivor, or successor, see TRUSTEE; DONEE; RENUNCIATION; RESIGNATION; REMOVAL.
must always be honestly exercised, see TRUSTEE (6).
DIVORCE. See THIRD PARTIES (2).
DONEE. See GIFT.
DONEE OF POWER, 473–493.
(1) *Who may be*, 425, 473.
donee may execute though donor out of possession, 473.
donee's insurable interest, 492.
if no donee named, 492–493.
when power then vests in court, 492–493.
when in executor, 492–493.
if donee named refuses to qualify, 478, 493.
death, removal, resignation, see *infra* (4); BENEFICIARY.
co-tenant of testator's heirs, as donee, 477.
donee under foreign will, 477–478.
(2) *Executor as donee*, 479–492, 525–530.
(*a*) In general. When beneficial, when in trust, 460, 479.
when must qualify before executing, 479.
letters as *prima facie* evidence, 479.
commissions, 485.
what powers inherent in executors, 479.
may sell land bought in on foreclosure, 479.
or land conveyed to them pending foreclosure, 479.
such lands are personalty, 479.
judgment lien does not affect such, 479.
fraudulent sales by executor, penalty, 479.
power to executor to sell and pay debts, 481, 491.

The references are to pages.

DONEE OF POWER—*Continued.*
does not direct payment of mortgages, 481, 491.
accounting by executor-donee, 163, 164, 468, 485.
sale by executor to himself, result, 485.
general power, authorizes sale for distribution, 485.
(*b*) Charging debts and legacies, 480–485.
power in executor, when effects a charge, 480–483.
charging debts and legacies, 480–485.
no charge, imperative power, creditors' rights, 468, 469, 481–485.
charge on land, no power, 483–484.
charge does not necessitate power in executor, 483.
charge renders power unnecessary, 483.
but not repugnant, 483
(*c*) When renders proceeds general assets, 164, 165, 468, 481–485, 490, 517.
accounting for before surrogate, when, 468, 484–485.
term of years devised to executor to pay debts, 485, note.
equitable assets, 484.
when available for debts, 484–485.
when surrogate may decree distribution, 485.
(*d*) Creditors' proceedings for statutory sale, 468, 469, 481–485.
effect on, of power in executor, 468, 469, 481–485.
deficiency of personal assets, 483–484.
if lands sold, statutory sale then impossible, 484.
(*e*) Executor as donee, in what capacity, 106, 486–492, 525–530.
executorial, trust or personal capacity, 486–492.
bearing of this question, 486–488.
bearing on form of executing power, 239, 486–488.
and on devolution of power upon death, etc., 486–488.
distinction depends on intent, 487
power may be purely personal in individual, 486–487.
bearing of discretion on distinction, 487, 489.
power coupled with trust, survives, 487.
personal in donee, his insanity, result, 488.
power in donee as an individual, 488–489.
to whom passes, on vacancy, 486–489.
power in executor as such, 460 489–491.
if so, passes to administrator with will annexed, 488–490.
successor as trustee cannot execute, 490.
executor selling land of which testator was trustee, 490.
then liable as executors to real owner, 490.
power in trustee as such, 490–492.
does not pass to administrator with will annexed, 488–491.
but to successor in trusteeship, 491.
for similar question of capacity, see TRUSTEE (1).
(3) *Removal of donee*, 478, 487, 529, 653.
for refusal to execute power, 478.
for improper use of power, 478.
(4) *Successor of donee*, 478–479, 486–493, 527, 553.
See BENEFICIARY ; *supra* (2).
when, and by whom appointed, 478–479, 487.
renunciation, resignation, removal, 478, 529, 553, 607–609.
if power is for charitable use, 478.
when power vests in court, 478, 487, 492, 493, 652.
(5) *Two or more donees*, 105–112, 524–530.
all must unite in executing power, when, 524.
refusal of one to co-operate, 471.
death of one, survivors may execute, 524.
power in executors, neglect of some to qualify or act, result, 526–530.

The references are to pages.

DONEE OF POWER—*Continued*
same as to imperative and discretionary powers, 525–530.
See DISCRETION.
same if power effects conversion, 525–526.
when court may fill vacancies, 527.
effect on power of renunciation, resignation, removal, 524–530.
when one may execute and others ratify, 530.
co donees, liability of one for other's acts, 530.
(6) *Liability of donee.* See EXECUTION OF POWERS (1); ACCOUNTING.
(7) *Duties of donee.* See EXECUTION OF POWERS; POWERS IN TRUST.
DONOR. See DONEE; DEFINITIONS.
DOWER. See THIRD PARTIES (5); WIDOW.
widow of trustee or *cestui*, none, 116.
widow's election of dower, effect on trust scheme, 604.
apportioning outlays and charges, see RENTS AND PROFITS (5).
DRUNKARD as trustee, 68, 69.
court compelling conveyance by, 69.
See RENTS AND PROFITS (9).

EDUCATIONAL. See CHARITABLE
EJECTMENT. See PARTIES; ACTIONS.
ELECTION to dispense with power. See TERMINATION (2).
widow's election, 604.
See DOWER.
election to take in lieu of commissions, see COMMISSIONS.
election of remedies, see TRUSTEE (7).
ENTIRETY, ESTATE BY, 249.
EQUITABLE CONVERSION, 124, 499–500, 554–559.
effect on parties, 448–450, 499–500.
when renders proceeds assets, 165.
by whom actual sale made, see DONEE (5).
ESTATE. See BENEFICIAL POWERS; TITLE.
ESTOPPEL. See BOND; LIMITATION; DECREE; TRUSTEE (6), (7), (9); ACCOUNTING.
(1) *Of beneficiary*
not estopped to repudiate illegal assignment, 379.
estopped by own order on trustee, when, 379–380.
by acquiescence in trustee's wrongdoing, 182.
as to conveyance by trust donee to himself, 494.
as to other acts of donee, 524, 530.
cestui's consent to foreign investment, 147.
same to change of investment, 379.
consent to setting off particular trust fund, see INVESTMENTS; SEPARATE TRUST SHARES.
delinquent trustee also beneficiary, 156.
cannot make trustee pay twice, when, 359.
objection to trustee's appointment, 78.
(2) *Of trustee.*
to attack trust, 103.
as also his vendee with notice, 103.
see also as to trustee's duties and liabilities, TRUSTEE.
as to sureties as privies, see BOND.
as to *res adjudicata*, see DECREE.
EXCESSIVE EXECUTION. See EXECUTION OF POWERS (6).
EXECUTION OF POWERS.
(1) *Method, scope and time.*
(2) *Two or more donees.*
(3) *Consent of third person.*
(4) *Failure to recite power.*

The references are to pages.

EXECUTION OF POWERS—*Continued.*
(5) *General devise by donee.*
(6) *Disposition too extensive.*
(7) *Fraudulent execution.*
(8) *Defective execution.*
(9) *Default in execution.*
(10) *Void execution.*
(11) *Equitable conversion.*
(12) *Execution by the court.*
(1) *Method, scope and time of execution*, 508–523.
instrument of execution, recording, 508.
by will, 508–509.
by grant, 509–510.
signing individually, 510.
delivery of deed, 510.
inserting covenants, whether donee may, 437, 653.
reserved power to appoint, execution, 510.
See RESERVATION; APPOINTMENT.
statutory construction of trustee's or donee's deed, 510.
donee's agreement to execute power, 510–511.
enforcing conveyance accordingly, 511.
specific performance, when, 511.
land in another state, 511.
infant trustee, compelling to convey, 511.
donee must account for forfeit money, 511.
donor's directions as to execution, 511–512.
when disregarded as nominal or useless, 511–512.
when directions must be observed, 512–521.
thus, as to manner and purpose, illustrations, 512–516, 517.
evading donor's directions, 512, 513, 514, 518.
See *infra* (7).
when terms of power imply wider power, 512–515, 517.
scope of power to sell, to exchange, 175, 512.
to mortgage, to sell part, 512.
to purchase, to lease, to cut timber, to divide, 513–515.
to appoint, 513.
See BENEFICIARY.
discretion as to method and purpose, 514–516.
does not warrant arbitrary acts, 518.
purpose named must be followed *bona fide*, 512–521.
to sell for debts, selling for outlawed, 515.
selling to pay debts due to donee, 515.
if donee has a title, effect on of undue conveyance, 515.
presumption of due exercise, 515, 519, 523.
power must be exercised for beneficiaries named, 516–517, 642–650.
testator may sell, and thus annul power in his will, 516.
if he sells but dies before conveying, 516.
whether donee of power may convey to such vendee, 516–517.
conditions imposed must be complied with, 133, 445, 517–519.
donee must observe spirit of power, 518.
See *infra* (6), (7).
when notice of sale, 519.
when auction sale, 519.
time of executing power, 519–521.
when to be exercised, 474, 519–521.
when too early, too late, 445, 474, 519–521.
whether will executes power acquired after execution, see *infra* (5).
discretion as to time, when, by whom, 519–521.
See DONEE (5).

The references are to pages.

EXECUTION OF POWERS—*Continued.*
reasonable time for sale, what is, 144.
control of court over discretion, 520–521.
power of appointment, scope of execution, 451, 521–523.
See APPOINTMENT.
what estates may be appointed 451, 521–522.
when may appoint to trustees, 348, 521–522.
when may appoint defeasible estate, 451.
when contingent limitation, 451.
appointee takes under original instrument, 522.
when appointee's interest vests, 522–523.
successive appointments, 451.
piecemeal appointments, 451
instrument executing power, when cloud on title, 523.
foreclosure of mortgage given under power, 523.
power executed and later adjudged void, result, 523.
illegal execution, possibility of does not invalidate power, 524.
estoppel, ratification, waiver, 524, 530.
See ESTOPPEL
(2) *Two or more donees,* execution by whom, see DONEE (5).
(3) *Consent of third person* to execution, 133, 465, 530–533.
if consent of two or more required, 530.
all must consent, 530.
consent of survivor, when, 530.
consent of executor or trustee *as such,* 530–531.
when successor, or court may consent, 530–531, 606–609.
requirement of consent negatives absolute power, 532.
beneficiary as the third person, 465.
consent, how to be evidenced, 532–533.
(4) *Failure of donee to recite power,* effect, 533–538.
statute applies both to realty and personalty, 534.
evidence to show intent to execute, 535, 538.
misrecital, effect, 536.
(5) *General devise by donee,* effect, 536–539, 681 note.
compared with failure to recite power, 537.
evidence to show intent to execute power, 538.
general residuary devise, 538.
general devise under reserved power, 538.
general bequest of personalty by donee, 538.
power acquired after will executed, 539.
(6) *Disposition by donee too extensive,* 539–550.
excessive execution, 539–550.
two classes of excessive execution, 540.
illustrations of excessive execution, 541.
partial appointment to non-object, 542, 543–550.
attempted delegation, appointment over to objects, 542–543.
appointment both to objects and non-objects, 543–550.
See SEPARABILITY; BENEFICIARY (3).
(7) *Fraudulent execution,* 539–550.
general principles, 543–544.
fraud in executing power of sale, 544–545.
duties of donee of trust power, 544–550.
collusive sale or purchase, 544–545.
conveyance to himself, 544.
bona fide purchaser from fraudulent donee, 545.
what constitutes notice, 545.
setting aside sale, 545.
fraudulent appointments, 539–543, 543–550.
constructive fraud, 539–550.

The references are to pages.

EXECUTION OF POWERS—*Continued.*
evasion of spirit of power, 539–550.
agreement with appointee to convey to others, 543–550.
See SEPARABILITY; BENEFICIARY (3); RENTS AND PROFITS (9).
(8) *Defective execution*, 550–553.
of power in trust, 550.
of power either beneficial or in trust, 550.
general discussion of defective executions, 550–551.
what is defective execution, 552–553.
perfecting in equity, 550–553.
(9) *Default in execution*, 497, 553–554, 681 note.
See BENEFICIARY.
whether power extinguished by default, 553.
estate limited upon default, 462–464, 553.
execution after default, when, 554.
person entitled in default, 77.
remedy against pretended appointment, 77.
remedy by ejectment, 77.
judicial recognition of appointment, effect, 77.
(10) *Void execution*, 554.
(11) *Equitable conversion*, see that title.
(12) *Execution by the court*, see JUDICIAL CONTROL.
EXECUTOR. See DONEE; TRUSTEE; BOND; REMOVAL; COMMISSIONS.
when power vests in, see DONEE (1).
See ACCOUNTING; ANNUITY; BENEFICIAL POWERS.
as trustee, see TRUSTEE (1), (7).
as donee, see DONEE (2)
donee of general power, scope, see DONEE (2) *a*.
when power in renders land assets, see DONEE (2) *c*.
when creates charge, see DONEE (2) *b*.
statutory sale to pay debts, see DONEE (2) *d*.
vacancy in office, see DONEE; REMOVAL; RESIGNATION; RENUNCIATION; TRUSTEE (1), (2).
declaration of trust by, 30, 154.
custody of life legacy, when, see TRUSTEE (1).
EXPRESS TRUST. See TRUST.
defined, 11.
distinguished, see TRUST.

FAILURE to recite power, see EXECUTION OF POWERS (4).
FEE. See BENEFICIAL POWER; TITLE; DONEE; TRUSTEE.
FORECLOSURE. See ACTIONS; MORTGAGE.
FRAUD. See TRUSTS (2); ATTEMPTED TRUSTS (6); BENEFICIARY; REVOCATION; THIRD PARTIES (3); TRUSTEE (6); NOTICE.
fraudulent sale by executor, 479.
fraudulent execution, see EXECUTION OF POWERS (6), (7).
trust void for fraud, 419, note.

GENERAL ASSIGNMENTS. See PURPOSE (1) *b*.
right to make, is not statutory, 284.
belong to first class of trusts, 285, 286.
what are, 286.
what are special assignments, 285.
assignor cannot revoke, 286.
effect of U. S. Bankruptcy Acts, 286.
death of assignee, new appointment, 82.
general assignment void, result, 213–214.
beneficiaries under, 255.
commissions, 216, 228, 230, 231.

The references are to pages.

GENERAL ASSIGNMENTS—*Continued.*
effect of assignment on easements, 287.
termination of, see TERMINATION.
declaration of trust, by bankrupt, 30, 31.
general assignment of trustee, 117.
GIFT. See TRUST (7), (8).
GRANT. See ACKNOWLEDGMENT; SEAL; BENEFICIAL POWERS; EXECUTION OF POWERS; TRUST (6).

HABENDUM in trust, 356, 602, 643.
HEIRS, 97, 98, 250.
See CHILDREN.
law favors equality among, 646.
under power to sell and distribute according to statute, 445.
then heirs take proceeds of realty, 445.
next of kin take proceeds of personalty, 445.
when take through failure of trust, see ATTEMPTED TRUST (8).
as beneficiaries, meaning, 250.

IDIOT. See LUNATIC.
IMPERATIVE POWER. See POWER IN TRUST; EXECUTION OF POWERS; JUDICIAL CONTROL; DISCRETION.
INCOME. See RENTS AND PROFITS.
INFANT as creator of trust, 20, 419–420.
as donee of power, 476.
as beneficiary, 246.
as beneficiary of insurance policy, 50, note.
See RENTS AND PROFITS (9).
as trustee, 68, 69.
infancy ground for removal, 69.
court compelling infant to convey, 69, 511.
ratification by, after majority, 160.
disaffirmance, 419–420.
infant's property, see JUDICIAL CONTROL; LEGISLATIVE CONTROL; LEASING; TRUSTEE (5); REMAINDER.
INJUNCTION. See ACTIONS; PARTIES.
INSURANCE, 50, note, 90, 104, 105, 125, 267, 313, 319, 413.
donee's insurable interest, 492.
INTEREST on deficiency fund, see RENTS AND PROFITS (9)
See also TRUSTEE; BENEFICIARY.
INVESTMENTS. See TRUSTEE (7).
selling land in order to invest, 681 note.
when court cannot order, 130.
investments, no statutory rule, 144.
exceptions, 144, 148–149.
what are proper, illustrations, 144–157.
discretion, scope of, 144–145, 681 note.
"unincumbered," meaning; taxes, not encumbrance, 146.
trustee must examine title, must value correctly, 146.
what proportion proper, 147.
must continually watch investments, 146.
propriety of, when *res adjudicata*, 146.
depreciation, sudden decline, liability, 146.
default in interest is notice to trustee, 146.
trustee's liability for prudence, etc., 147.
control of court in changing investments, 147, 681 note.
effect of consent of *cestui* to foreign, 147.
where investment not voluntary, 147–150.
lands received by trustee, 147, 149.

The references are to pages.

INVESTMENTS—*Continued.*
lands bought in on foreclosure, 147.
loan to beneficiary, 147, 357, 358, 363, 379.
beneficiary then a third party, 148.
investment in trustee's business, 200, 202.
loan to cotrustee, 200, 202, 203.
paying mortgage on trust land, 149.
improper purchase gives trustee title, 149.
building house on trust land, 149.
corporation stock, liability as stockholder, 149–150, 268.
trust instrument may vary rules, 149, 152, 153, 681 note.
for trustee's personal benefit, 151.
to bolster up former unauthorized, 151.
improper, when constitute devastavit, 151.
continuing existing investments, 151–153, 681 note.
power to change, bearing on liability, 152.
consent of *cestui* to change, 379.
direction to sell, scope and bearing, 152–153.
grant of discretion, bearing, 153.
does not warrant corrupt selection, 153.
must account for bribe received, 153.
must not mingle trust and personal funds, 153, 154, 172.
rights of beneficiary in such case, 153–154.
See TRUSTEE ; BENEFICIARY.
may invest distinct funds together 154.
mingling funds of separate trusts, 154.
and taking security as trustee for one, 154.
may then declare trust as to other, 30, 154.
investment of distinct portions, 154–156.
securities naming trustee personally, 154, 157.
when may set up distinct fund, results, 124, 155–157, 265, 267, 314–315.
See SEPARATE TRUST SHARES.
and allot specific securities to it, 155.
when consent to this necessary, 155.
See CONSENT.
when consent binding, 155.
if securities unauthorized, effect, 155.
if separation directed, must comply, 155, 681 note.
separation required, but omitted, result, 155–156.
if duly made, results, 155–156.
See SEPARATE TRUST SHARES.
beneficiary then confined to own fund, 156.
appreciation and depreciation of distinct funds, 156–157.
effect on each beneficiary, 156.
if delinquent trustee is a beneficiary, 156.
investments by trust company, 157.
usurious investments, effect, remedy, 157.
See USURY.
when beneficiary should find investments, 176.
when funds too small to invest, 176.
same, if several small trusts, 177.
ISSUE. See CHILDREN.

JUDGMENT. See ACTIONS ; DECREE ; PARTIES.
to what attaches, effect of power, see THIRD PARTIES (1).
JUDICIAL CONTROL, 606–609.
See REMOVAL.
(1) *Equity*, 11, 132, 159, 160, 162, 260.

The references are to pages.

JUDICIAL CONTROL—*Continued.*
general jurisdiction over trusts, 2, 11, 238–243, 466–472, 605–606, 636–640.
See Powers in Trust.
scope of term "equity," 263.
See also Accounting.
inherent jurisdiction, 6, 160, 240, 367, 368, 636–639, Code C. P., § 217.
incidental, 161, 639.
statutory, 76–91, 367, 636–639.
over trusts for married women, 386, 415–418.
trust or power vesting in equity, when, 81, 89, 606–609.
See Donee (1), (4), (5); Powers in Trust.
equity executing trust or power, how, when, 75, 83–87, 235, 236, 239, 349, 466–472, 497, 553–554, 606–607.
through an agent, when, 349, 606–609.
consenting to execution of power, see Consent.
control over investments, see Investments.
power to appoint successors, when, 76–91, 235–237, 239, 486–493, 524–530, 607–609.
specific performance, 609–610.
enforcing conveyance by infant, etc., 69.
transfer of legal title by Court of Equity, 609–610.
property out of State, effect, 609–610.
trustee out of State, effect, 609–610.
both property and trustee out of State, 609–610.
contempt proceedings, 180, 260, 609–610.
exercising discretion as to trust or power, see Discretion.
applying to equity for instructions, 130, 212, 368, 605.
trustee then protected, 213, 599–600.
equity cannot destroy a trust, see Termination.
power to decree trust void, 605–606.
equity disturbs no trust unless in issue, 606.
testamentary authority to equity to amend trust provisions, 606.
Supreme Court, trustee for charities, when, 606.
See Charitable Uses.
authority to direct sale, mortgage, lease, 367, 368, 606.
jurisdiction over infant's estates, 345–349, 367, 368, 415, 606.
over estates of other incompetents, 345–349, 606.
See also Legislative Control.
reforming instrument, 104, 413.
perfecting defective transfers, when, see Trusts (9).
jurisdiction over trust company, 159, note.
void conveyance by court order, effect, 77, 130.
when legal remedy to be first exhausted, 188.
concurrent remedies against sureties, 188, 190.
concurrent, between equity and surrogate, 158–159.
power to charge outlays on corpus, when, see Rents and Profits (4).
allowing cost of improvements by one in possession, 328.
(2) *Law.* See Beneficiary.
action by *cestui* against trustee for damages, 11, note 1.
(3) *Surrogate*, 640–641.
statutory jurisdiction of surrogate, 238, 640.
is constitutional, does not impair that of equity, 238.
See also Accounting; Construction.
surrogate's jurisdiction limited, 89, 166, 167.
surrogate's decree, effect on title, 261, 640.
jurisdiction over trust power, see Donee.
jurisdiction to order sale for debts, see Donee (2) *d.*
to appoint successors, 79–91, 239, 486–493, 524–530, 607–609.
incidental, 641.

The references are to pages.

LACHES. See Estoppel.
LAPSE, 103.
See Residuary Clause.
LEASING. See Rents and Profits.
(1) *Trustee's authority to lease*, 342–350.
specific provisions as to, 342.
implied from authority to receive rents, 342.
trust to sell, does not authorize lease 342.
possible exception, 342–343.
authority, from what implied, 343.
power in trust to lease, 343.
See Execution of Powers; Purpose (2).
(2) *What term authorized*, 343.
lease beyond term of trust, when, 343–350.
such power may be conferred, 343, 344.
if fee in trustee, 343–344.
what term then authorized, 343–344.
if fee not in trustee, 344–350.
life tenant, lease by beyond term, 344.
trustee for life, lease beyond term, 344–350.
if remaindermen infants, etc., 345, 348.
court may then order lease, 345.
under legislative authority, 345–347.
proceedings to secure such order, 345.
if remaindermen not incompetent, 345.
court then cannot order lease, 345.
nor can legislature authorize, 345.
statute as to lease by court order, 345–346.
scope of this statute, 346–348.
does not affect remainder, when, 346.
notice of application for order, 346.
when lease without order, 345–346.
statute, to what trusts applies, 347–348.
renewal clause, power to insert, 348–349.
effect of, 348.
when binding on remaindermen, 348.
if they take as appointees under power, 348.
appointees take subject to leases, when, 348.
personal covenants in trustee's lease, 349.
they and successors, when bound, 349.
enforcing against trustee, 349.
liability for nuisance on leased property, 115, 349.
lease of infant's remainder, 349.
lease of property held in separate shares, 349.
trustee to receive rents, 349.
when need not lease, 349.
may let *cestui* occupy, 349.
if trust lease invalid, tenant's liability, 350.
(3) *Leases, second class of trusts*, 350–352.
trust "to sell, mortgage or lease," etc., 350.
meaning of "lease" in such trust, 350–352.
two views of meaning, 350–352.
whether authorizes receipt of rents, 350.
or only sale of a term of years, 350–352.
(4) *Apportionment of rents*, see Rents and Profits (6), (7).
LEGACY. See Assignment by Beneficiary (1) *b*; Purpose (1) *b*, *c*; Rents and Profits; Powers in Trust (2).
legacy of interest on fund, 384.
and legacy of use of fund, 384.

The references are to pages.

LEGACY—*Continued.*
first gives gross, second net, income, 384.
to sell and pay proceeds, is legacy, 291.
legacy, when payable, 340–341.
interest on, from when computed, 340–341.
See RENTS AND PROFITS (7).
gift of income, when carries corpus, 31, note; 266.
LEGISLATIVE CONTROL. Sales, mortgages, see TRUSTEE (5); JUDICIAL CONTROL.
leases, see LEASING; JUDICIAL CONTROL.
infants' estates, see INFANT; REMAINDER; JUDICIAL CONTROL.
power to charge *corpus* with taxes, assessments, etc., see RENTS AND PROFITS (4).
power to apply corpus to use of life *cestui*, see RENTS AND PROFITS (9)
LIFE TENANT. See BENEFICIAL POWERS; TRUSTEE; LEASING; REMAINDER; SALES; MORTGAGE; TITLE; POWERS IN TRUST; RENTS AND PROFITS (9).
as donee of power, 474, 475.
of trust power, 459–465, 474.
of beneficial power, 453–465.
of power to consume, 367, 474.
of power to appoint what is left, 367, 474.
of power to lease, 475.
mortgage by, effect on power to lease, 475.
delegation of his power to lease, 477.
when entitled to custody, 474, 475.
same on giving security, 223, 474, 475.
See TRUSTEE (1)
applying corpus to use of, see RENTS AND PROFITS (9).
as trustee of lands bought by testator, 492, note.
as trustee for remainderman, in what sense, 110, 170, 253.
judgment against if estate subject to power, 459.
unauthorized sale or mortgage by, effect, 603, 681.
corpus and income distinguished, see RENTS AND PROFITS (2).
apportioning deductions between life tenant and remainderman, see RENTS AND PROFITS (3), (4), (5).
apportioning rents and annuities, see RENTS AND PROFITS (6).
LIMITATIONS, STATUTE OF, 611–622.
at law, in equity, laches, stale claims, 611–622.
effect of statute on liability of trustee, 611–622.
action on sealed instrument, 620.
suit against trustee appointed by deed is not, 620.
suit to enforce trust in sealed will is not, 620.
waiver of statutory bar, 620.
repudiation of trust, effect of, 611–622.
infancy, absence from state, etc., 621.
no acting trustee, effect on limitation, 236, 621.
if trustee disabled to sue, but *cestui* might, result, 621.
claim to future interest, when time begins to run, 143, 621.
trustee's claim for contribution from co-trustee, 621–622.
when does such cause of action arise, 621–622.
when time runs against trustee, 621.
effect of new promise, or part payment, 622.
English Statute of Limitations, 622.
LUNATIC as trustee, 69.
court compelling conveyance by, 69.
as beneficiary, 247.
See JUDICIAL CONTROL; TRUSTEE (5); LEASING; SALE; LEGISLATIVE CONTROL; RENTS AND PROFITS (9).

The references are to pages.

MAINTENANCE. See CHAMPERTY.
of beneficiary, see RENTS AND INCOME.
MARRIED WOMAN as creator of trust, 20.
as trustee, 68–71.
as donee of power, 473, 474.
terminating trust for, 386, 415–418.
MERGER of title and power, see BENEFICIAL POWERS.
of *cestui's* interest and remainder, see BENEFICIARY; TERMINATION; REMAINDER.
MORTGAGE. See ACTIONS; PARTIES; THIRD PARTIES (3); PURPOSE; TRUSTEE (5).
when in trust, when not, 14, 267, 308.
foreclosing trust mortgage, 260.
mortgage by *cestui* to trustee, 147, 357, 358, 379.
foreclosing mortgage given under power, 523.
foreclosing mortgage given by trustee, 291.
mortgagee's power to sell passes to assignee, 477.
mortgage not a debt payable by executor, 481, 491.
paying mortgage on trust land, 149.
mortgage affecting remainder, see TRUSTEE (5); CONTRAVENTION OF TRUST; REMAINDER; JUDICIAL CONTROL; LEGISLATIVE CONTROL; INFANT.
trust to mortgage, see PURPOSE (1) *c*.
absolute grant, grantee's agreement to mortgage, 291.
such, for grantor's debts, valid, but not trust, 291.
power to mortgage, see PURPOSE (2); EXECUTION OF POWERS.
corpus and income distinguished, 313–315.
if *cestui* occupies, he pays mortgage interest, 357.
mortgage by creator after transfer to trustee, see TRUSTEE (3).
by administrator, 681.
payment of mortgage by remainderman, 96.
payment of mortgage interest by remainderman, 322.
MORTGAGEE. See MORTGAGE.

NEXT EVENTUAL ESTATE. See RENTS AND PROFITS (10).
NEXT OF KIN. See HEIRS.
NOTICE. See BOND.
to debtor, by assignee of debt, 54.
what gives purchaser, etc., notice of trust, 136, 202, 288.
See EXECUTION OF POWERS; POWERS IN TRUST (3); THIRD PARTIES (3); TRUSTEE (7).
of sale, by donee, see EXECUTION OF POWERS (1).
to trustee, of creation of trust, 25, 43, 255.
to *cestui*, of same, 25, 255.
of appointment of trustee, 76, 77.

PARTIES. See ACCOUNTING; DECREE; ACTION; JUDGMENT, REMOVAL; TRUSTEE (2), (4), (9).
conversion, 114.
to get possession of trust res, 114.
for damages to realty, 114, 115.
citizenship of, 116.
residence of, 116.
failure to cite necessary, on accounting, 265.
assignee of party when bound by decree, 160.
trustee as, cannot attack trust, 161.
effect of equitable conversion, 499–500.

The references are to pages.

PARTITION. See Actions.
power of partition, 503.
See Purpose.
PASSIVE TRUST. See Trust; Attempted Trusts; Rents and Profits (9).
PERSONAL PROPERTY, 647–654.
See Trust Property; Purpose.
when governed by same law as realty, 647–654.
when not, 653–654.
limitation of future and contingent interests, 648, 649.
suspension of ownership, term, test, 278, 279, 559–565, 649, 654.
inalienability of *cestui's* interest, 650.
accumulations, see Purpose (1) *e*, *f*, 305–307, 649.
no title in *cestui*, 650.
See Beneficiary.
acts in contravention, 651.
land bought in is personalty, when, 134, 479.
judgment lien does not affect such, 479.
unauthorized investment in land, 134.
trust may be for any purpose, 653.
exceptions, 653.
removal or resignation of trustee, 651.
lapse, residuary clause, 651.
termination of trust, 650, 651.
trust or power for charity, see Charitable Uses.
tenancy joint or in common, 258, 259, 650.
declaration of trust, oral, 33, 37.
income, see Rents and Profits.
undisposed of, 650.
authority to receive, when implied, 101, 650.
authority to receive when implies trust, 101, 654.
gift of, when carries corpus, 31, note, 266.
income and gross sum distinguished, 384.
discretion in applying rents, 359.
powers, 651–653.
See Powers.
general devise executes, 651, 652.
failure of donee to recite, see Execution of Powers (4).
former powers abolished, 652.
beneficial power, creditors, 650, 652.
beneficial power, when confers fee, 652.
See Beneficial Power.
death of last trustee, trust vests the court, 652, 653.
See Judicial Control.
removal and resignation of trust donee, 653.
donee's power to warrant, 653.
reserved power to occupy, reserved power to revoke, distinguished, 356, 414.
POWERS. See Powers in Trust; Beneficial Powers; Donee; Execution of Powers; Purpose; Termination.
(1) *In general.*
(2) *Powers defined and classified.*
(3) *Creation of powers.*
(4) *The legal title.*
(5) *Powers reserved.*
(1) *In general*, 421–423.
the early law of powers, 421–422.
former powers all abolished, 422.
now to be created, construed and executed, how, 422.
scheme of Revised Statutes, 422–423.

The references are to pages.

POWERS—*Continued.*
present law is complete code, 422.
bearing of early law, 422–423.
retroactive effect of revision, 423.
cy pres, not in New York, 423.
trust and power may co-exist, 424, 504–505.
(2) *Powers defined and classified*, 424–432.
power defined, 424.
distinguished from express trust, 99, 101, 424.
distinguished from power of attorney, 424.
distinguished from charge, 425.
grantor and grantee of power defined, 425.
same meaning as donor and donee, 425.
power coupled with interest, 426.
power coupled with trust, 426.
absolute power of disposition, see BENEFICIAL POWERS.
former division of powers, 426–427.
appendant, appurtenant; collateral, in gross, 426–427.
present division explained, 427.
general classification, 427.
general power defined, 427.
absolute power defined, 428.
See BENEFICIAL POWERS.
special power defined, 428.
beneficial power defined, 428.
See BENEFICIAL POWERS.
scope and bearing of definition, 429.
power in trust defined, 430–432.
See POWERS IN TRUST.
general meaning and scope of definitions, 431–432.
(3) *Creation of powers*, 432–452.
(*a*) Who may create, 433.
by one not in possession, 433, 473.
See CHAMPERTY.
(*b*) Powers, how created, 433–444.
the statutes, 433–434.
by grant *inter vivos*, 434–435.
by will, 435.
incorporation of paper by reference, 36, 37.
after-acquired lands, how affected, 435.
by implication, 435–437, 464.
illustrations of implied powers, 435–437.
See EXECUTION OF POWERS.
when not implied, 437.
reservation of a power, 438.
powers created by operation of law, 438.
as where certain trusts operate as powers, 26, 395, 396, 438–439.
title then passes to heirs, etc., 439–440.
if no power to receive rents, is only a power, 396, 439.
See ATTEMPTED TRUSTS.
reason for this rule, 439.
power thus effected, effect on foreclosure, 439.
trust for non-statutory purpose, 440–443.
See ATTEMPTED TRUSTS.
such takes effect as power, 440–443.
title then passes to heirs, etc., 441.
to what cases applies, 441–442.
thus, to partition, to sell when, 441.
to sell and distribute, as to which *quære*, 441.

The references are to pages.

POWERS—*Continued.*
to divide, to hold as security, 441–442.
other illustrations, 441–442.
if express trust intended, effect, 442.
to convey, merely, is not of this class, 442.
to partition, etc., and convey, is, 441.
record, probate, 443–444.
foreign wills, 443.
(4) *The legal title,* 441–442, 444–452.
title vests subject to power, 444.
devise and power consistent, 444.
ineffective devise, and power, 444.
latter valid though former fails, 444.
title and power in same person, 444.
holder of title subject to power, 444–445.
in what sense he is "owner," 444–445.
title subject to successive powers, 445.
title subject to conditional power, 445.
sale or mortgage subject to power, 445.
grantee or mortgagee acquires what, 445.
See also *Peters* v. *Gemmel*, Daily L. J., Jan. 5, 1897, p. 979.
if power exercised, his claim is on proceeds, 445.
donee as legatee of proceeds, 445.
when this gives him no fee, 445.
devise subject to power to sell, 445.
and hold proceeds for *cestui*, 445.
when consistent with fee, 445–446.
devise subject to power to sell or partition, 446, 448–450.
if power for benefit of devisees, 446.
their interest may vest defeasibly, 446.
or remain contingent, 446.
imperative power to sell, 446.
when effects conversion, 446.
where is title prior to actual sale, 446.
such donee cannot sue for trespass, 446.
may sue in equity to prevent spoliation, 446.
when donee may sue to quiet title, 446.
when to remove cloud on title, 446.
when for award under eminent domain, 446.
when may dedicate land to public use, 446.
when may pay taxes, so as to clear title, 447.
cannot sue in ejectment, when, 447.
rents.
pending sale, who entitled to, 447–448.
if no conversion, heirs take when, 447–448.
if conversion, who takes rents, 447.
heirs then accountable for to whom, 447.
executor receiving, to whom accountable, 447.
testator's creditors, when entitled to, 447–448.
if heir receives, not accountable to creditors, 448.
they must subject them to debts, 448.
donee, when may not collect rents, 448
when may not make improvements, 448.
if he does, not accountable as executor, 448.
but merely personally, 448.
power to collect proceeds, includes rents, 448.
imperative power to convey to trustee, 448.
trustee then entitled to rents, 448.
and may compel conveyance, 448.

The references are to pages.

POWERS—*Continued.*
power to rent and apply rents, 448.
and in future sell and distribute, 448.
death of beneficiary before sale, 448.
See RENTS AND PROFITS.
partition, 446, 448–450.
right to, effect of power of sale on, 448–450.
when heirs or devisees may sue for, 448–450.
in spite of existing power to sell, 448–450.
ten cases considered, 449–450.
remainderman's action for partition, 449, 654, note.
when trustee may seek partition, 450.
See ACTIONS.
power subject to life estate, 450–451.
consent of life tenant to sale of fee, 451.
when consent valid, consideration, 451.
if life tenant trustee, cannot consent, 654, note.
estate subject to power is alienable, 451.
also devisable and descendible, 451.
so is vested right to contingent estate, 451.
power subject to lien or charge, 451.
sale under, allowing lien as part of price, 451.
power to sell subject to a mortgage, 451.
and to divide proceeds, 451.
these proceeds consist of value of equity, 451.
power to sell estate charged with legacies, 451.
when allows sale of clear title, 451–452.
legacies then being charge on proceeds, 451–452.
(5) *Powers reserved*, see RESERVATION ; THIRD PARTIES ; 458, 460, 476, 510.
POWER OF ALIENATION See ABSOLUTE POWER.
POWERS IN TRUST, 466–472.
See also POWERS ; DISCRETION ; BENEFICIAL POWERS (3), TITLE ; DONEE ; EXECUTION OF POWERS ; BENEFICIARY ; JUDICIAL CONTROL ; THIRD PARTIES (1).
(1) *In general.*
defined, 430.
life tenant with absolute power to sell and consume, 457, 461–464.
remainder over of what may remain, 456, 457, 461–464.
whether such power is in trust, 110, 457, 463.
powers in trust do not give donee a fee, 459.
beneficial and trust powers distinguished, 428–432.
See BENEFICIAL POWERS ; RENTS AND PROFITS (9).
trust power must have defined beneficiary,
See BENEFICIARY (3).
(2) *When imperative*, 466–469.
general principle, 466.
two or more donees, execution, see DONEE (5).
power to select, when imperative, 466, 471–472.
same, death of donee, enforcing power, 472.
execution by court for all equally, 472.
illustrations of imperative, 466–468.
imperative, when affects creditor's proceeding, 468.
cannot then have sale under statute, 468, 484.
See DONEE (2) *d.*
imperative, accounting to surrogate for proceeds, 468.
imperative to sell, and incidental to repair, etc., 468.
enforcing execution of imperative, 468–469.
See JUDICIAL CONTROL.
by creditors, by beneficiaries, 468–469.

The references are to pages.

POWERS IN TRUST—*Continued.*
imperative, must be exercised justly, 468.
bad faith in, ground for removal, 468–469.
then charged with resulting loss, 469.
action for against sureties, when, 469.
imperative to sell and pay legacies, 469.
legacies may vest before sale, 469.
execution by survivors, see DONEE (5).
(3) *When discretionary*, 469–472.
general principles, 469–471.
two or more donees, execution, see DONEE (5).
no discretion warrants dishonesty, 142, 469–471.
when court controls discretion, 469, 471.
when not, 469–471.
discretionary power reserved, 469.
discretionary, if exercised, affected by fraud, 470.
and by bad faith, 470.
bad faith, court interferes, 470–471.
discretion must be exercised, 470.
if erroneous grounds stated, effect, 470.
scope of discretion, 468–471.
effect of neglect in exercise, 471.
absolute discretion not favored, 142, 469, 471.
court interferes not in collateral suit, 471.
but only in suit for judicial intervention, 471.
grantee of donee, notice of bad faith, effect, 471.
refusal of donee to co-operate with co-donee, 471.
discretionary for one purpose, 471.
and imperative for another, 471.
imperative with discretionary features, 471–472.
power of selection, 466, 471–472.
devise to A *or issue*, "or" is substitutionary, 472.
power for benefit of A *or* issue, 472.
here "or" gives power to select, 472.
ground of distinction, 472.
discretion as to time, method, etc., 472, 508 *et seq.*, 519–521.
See DISCRETION.
PRECATORY. See TRUST.
PROMISE for benefit of third party. See TRUSTS (3).
PUBLIC POLICY, trust instrument cannot dispense with accounting, 159.
See CONFLICT OF LAWS; CONSTRUCTION; CHARITABLE USES; TRUST PROPERTY.
PURCHASER. See THIRD PARTIES.
PURPOSE.
(1) *Purpose of trust*, 282–311, 395–409.
See ATTEMPTED EXPRESS TRUSTS; PERSONAL PROPERTY; TRUST; TRUSTEE; RENTS AND PROFITS.
(*a*) In general.
revisers' note as to proposed changes, 282.
all trusts abolished, exceptions, 6–10, 282–283.
the four permitted classes, 282–307.
the four classes defined, 282–283.
no other purpose allowed, 101, 283, 400, 366.
special statutory trusts, 18.
cemetery trusts, 18.
the four permitted classes include sub-classes, 283.
purpose to be gathered from entire instrument, 283.
features common to four classes, 283–285.
these four not newly created by R. S., 283–284.

The references are to pages.

PURPOSE –*Continued.*
but were saved from the general repeal, 284.
early authorities therefore binding, 283.
under what are interests unassignable, 284.
relation of Rev. Stat. to prior law, 6–11, 284.
retroactive effect of Rev. Stat., 284–285.
same of Real Prop. L., 29, 284–285.
does not impair vested rights, 284–285.
nor affect construction of prior, etc., 284–285.
authority to receive rents, see RENTS AND PROFITS (8).
why requisite in trusts to sell or mortgage, 99, 439.
trust to pay debts, *inter vivos*, by will, 99, 439.
distinction as to requisite form, 99, 439.
power preferred to trust, when, 99, 290, 439.
court will not strive to find trust, when, 290.
(*b*) First class of trusts, 285–289.
to sell land for creditors, 285–289.
"creditors" who are intended, 286.
trust to sell must be absolute, 286.
no discretion save as to time or manner, 286.
sale must be primary purpose, 286.
covers entire property, 286
even though only part will suffice, 286.
even though some creditors repudiate, 288.
remedies of such creditors, 288.
involves fee in trustee, 286–287.
creator may grant subject to trust, 94, 286–287.
or devise subject to trust, 94, 95, 247, 286–287.
or appoint owner if trust fails or ends, 286–287.
such person has legal estate, 287.
except against the trustees, 287.
and those claiming under him, 287.
but creator of trust has no estate, 287.
See CREATOR OF TRUST.
nothing in him for judgment or levy to attach on, 287, 579.
he may pay debts and thus discharge trust, 287.
and would be entitled to balance after trust satisfied, 287.
but these rights give him no reversion, 287.
his right is purely equitable, 287.
when trustee's estate ceases, 287.
See TERMINATION.
when at end of twenty-five years, 287, 420.
when expiration presumed, 287, 420.
death of trustee, 287, 410.
this gives creator no new rights, 287.
this class covers general assignments, 285–286.
also special assignments, 285
See GENERAL ASSIGNMENTS.
if owner of land has easement over adjoining, 287.
which to end when he cease to "own," 287.
effect thereon of owner's general assignment, 287–288.
trust to sell and return proceeds invalid, 288.
trustee for creditors holds entire title, 288.
creditors cannot reach trust property, when, 288.
even though trust is for some only, 288.
creditors and creator may all release to trustee, 288.
trust then ceases, 288.
title then vests in whom, 288.
beneficiary may assign his claim, 288.

The references are to pages.

PURPOSE—*Continued.*
and may guarantee its collection, 288
if so, may still sue for accounting, 288.
enforcement of trust by beneficiary, 288.
or suit to protect his rights, 288.
need not first prove debt at law, 288.
this class of trusts waives usury, when, 289.
trust to pay outlawed debts, 289.
collateral, if one creditor holds 289.
may still prove entire debt, 289.
(*c*) Second class of trusts, 289–292.
to sell, mortgage or lease, 289–292.
for paying legacies, annuities, charges, 289–292.
if invalid as trust, when valid as power, 289.
does not cover debts not charged, 289.
such debts covered by Class 1, 289.
the two classes may be combined, 289.
trust for sale belongs to both classes, 289.
if to pay general debts, first class, 289.
if to pay charged debts, second class, 289.
if to pay both, how construed, 290.
purpose must be actual and *bona fide*, 290.
beneficiary takes no title, 290.
and cannot quit claim, 290.
but may assign his right, 290.
legacy charged on land vested in legatee, result, 290.
trust to sell, etc., and receive rents, 290.
to accumulate rents to pay debts, 290.
or accumulate to pay legacies or annuities, 290.
See *infra* (*e*).
when these invalid, 290.
trust may be valid for sale, 290.
even though invalid for mortgage, 290.
or valid to lease though not to sell, etc., 290.
See SEPARABILITY.
trust may be to sell only, 290.
or to mortgage only, or sell only, 290.
to sell, 290–291.
to sell and pay proceeds, is legacy, 291.
to sell and hold proceeds in trust, whether trust in land, 504, 505.
to sell and divide, 291.
to sell and distribute, 288.
if purpose fails, trust fails, 291.
to mortgage, 291–292.
to mortgage and divide proceeds, 291.
when invalid, 291.
absolute grant, grantee's agreement to mortgage, 291.
such mortgage for grantor's debts valid, 291.
but not a trust, 291.
surplus above debts, who owns, 291.
mortgage by trustee, foreclosure of, 291.
necessary allegations in complaint, 291.
need not allege trustee duly appointed, 291.
allegations where trustee plaintiff, 293.
to lease, 292, 342–352.
See LEASING; RENTS AND PROFITS.
(*d*) Third class of trusts. To receive and apply rents, 292, 381–384.
See RENTS AND PROFITS.
(*e*) Fourth class of trusts. See RENTS AND PROFITS.

The references are to pages.

PURPOSE—*Continued.*
to receive and accumulate rents, 292–307.
statutes regulating, realty, 293.
statutes regulating, personalty, 305.
two statutes compared and distinguished, 294, 305–307, 381–384.
when partly valid and partly invalid, see SEPARABILITY.
when accumulations must begin, 293, 306.
when begin at end of two lives, 294, 295, 297, 306.
not in personal property, 294, 296, 305–307.
when for infants yet unborn, 250, 294, 306.
for infants in being when, 294, 306–307.
for whom accumulations, 295–296, 306–307.
when for adults, 295, 296–297.
otherwise solely for infants, 295, 296, 307.
limitation over of accumulations, 295, 298–302.
successive accumulations, 296.
to apply part and accumulate part, 296.
to apply as needed for support, 296.
to accumulate to pay debts, 290, 296.
to accumulate to pay gross sum, 290, 304.
how term measured, 296–297, 305–306.
when term must end, 297–298, 305–307.
if beyond minority, excess void, 297.
the accumulated fund, 298–302.
disposition if infant dies under age, 298–302.
if no accumulation directed, 302.
in such case, surplus belongs to infant, 302.
what not an "accumulation," 302–304.
not such as are voluntarily saved up, 302–303.
nor proceeds of sales, 303.
nor savings to restore depletion, 303.
nor use of income to improve corpus, 303.
nor improvements paid by trustee personally, 303.
he may be reimbursed from increased rents, 303.
when trustee to accumulate may apply rents, 293, 305.
only if infant destitute, 293, 305.
only on order of court, 293, 305.
(*f*) Personal property, purpose, 305–311.
See PERSONAL PROPERTY.
any purpose, if not illegal, 307–309, 366.
purpose must be definite, 17, 401.
if merely "in trust," result, 253, 307.
illustrations of valid purposes, 307–309.
See RENTS AND PROFITS (9).
trusts for masses, 253, 309–311.
trusts for gravestone, 309–311.
trust for care of grave, 309–311.
See BENEFICIARY (2).
contract *inter vivos* for such purposes, 13, note 1, 309–311.
absolute gift, to attain same purpose, 309.
direction to executor to effect same purpose, 309–311.
power in trust to attain same purpose, 310–311.
See BENEFICIARY (3).
effect on foregoing of new statute, 310–311, 392–394.
(2) *Purpose of power*, 502–507.
See POWERS; DONEE; EXECUTION OF POWER.
must be for definite, active purpose, 401, 506, 507, 519, 524.
what purposes authorized, 502.
if not for proper, effect of waiver, 424.

The references are to pages.

PURPOSE—*Continued.*
scope and construction of various powers, 502.
to sell, mortgage, lease, dispose, charge, 502.
to executor to sell and pay debt, scope, 481, 491.
to distribute, select, convey, 502.
to partition, appoint, appoint trustee, 503.
general power to sell, scope, 485.
to appraise, collect, invest, 503.
to receive rents, consistent with power, 503–504.
to manage, repair, pay annuities, 504.
to terminate trust, 504.
to apply corpus, 366.
when purpose necessitates power, 504.
power to collect rents, when gives beneficial title, 504.
powers and trusts combined, illustrations, 424, 504–505.
power may render trust defeasible, 505.
trust for A, power in A to convey, construction, 505.
may be two distinct powers, 505, 516.
one may be subject to other, 505.
power and contingent future trust, 505–506.
unlawful purpose, 506.
power to sell and pay proceeds to corporation, 506.
trust to pay rents to corporation, 506.
trust to pay rents to alien, 506.
purpose must be observed in executing, see EXECUTION OF POWERS (2).
various purposes illustrated, see EXECUTION OF POWERS.

RECORDING. See EXECUTION OF POWERS; REVOCATION; TRUST (7).
REFUNDING, 168, 654.
See BENEFICIARY.
RELATIONS. See BENEFICIARY.
RELEASE. See ASSIGNMENT; ESTOPPEL.
by beneficiary if also remainderman, see BENEFICIARY.
RELIGIOUS. See CHARITABLE.
"RELIGIOUS PERSON" as beneficiary, 250.
REMAINDER. See PURPOSE (1) *b*; BENEFICIARY; LEASING; THIRD PARTIES; TRUSTEE (3); ACTIONS; LIFE TENANT; BENEFICIAL POWERS.
remainderman may convey in trust, 267.
if also *cestui*, may release and end trust, see BENEFICIARY.
cestui also remainderman, no merger, 97, 247, 418.
same in personal property, 247.
life tenant always trustee for remainderman, 253.
remainderman, mortgage by, effect, 131.
payment of mortgage by, subrogation, 96.
payment of mortgage interest by, remedy, 322.
trustee of remainder as *cestui* of prior trust, 248.
remainderman's right to security, 474.
remainder is alienable, descendable, devisable, 95, 96, 97.
remainder after indefinite void trust, 409.
remainder where life tenant absolute power, see BENEFICIAL POWER (2), (3).
remainderman's action for partition, 450, 654.
See ACTIONS; POWERS (4).
infant remainderman, see LEASING; TRUSTEE (5); CONTRAVENTION OF TRUST; JUDICIAL CONTROL; LEGISLATIVE CONTROL.
sale of remainder after trust, see JUDICIAL CONTROL; TRUSTEE (5); LEGISLATIVE CONTROL; CONTRAVENTION OF TRUST.
lease of remainder after trust, see LEASING.

The references are to pages.

REMAINDER—*Continued.*
corpus and income distinguished, see RENTS AND PROFITS (2).
apportioning outlays between life tenant and remainderman, see RENTS AND PROFITS (3), (4), (5).
apportioning rents and annuities, see RENTS AND PROFITS (6).
application of corpus to use of life tenant, see RENTS AND PROFITS (9).
remainderman's right to information, 143, note.
REMEDIES. See BENEFICIARY; TRUSTEE; REMAINDERMAN; JUDICIAL CONTROL; ACTIONS; PARTIES; DECREE.
REMOVAL. See JUDICIAL CONTROL; TRUSTEE (1), (2).
grounds, 69–71, 142, 239–243, 259, 358.
illustrations, 241–243.
jurisdiction, 239–243.
statute confined to express trust, 240.
inherent jurisdiction of equity, 240.
jurisdiction of former Superior Courts, 243.
effect of giving bond, 241.
when no removal, illustrations, 241, 243.
proceedings, parties, pleadings, 243.
remaining trustee, when a "successor," 244.
trustee also executor, 244.
when removed from one only, 244.
decree, effect, 244.
as to decree denying removal, 244.
executors of removed trustee, 244.
reviving proceeding against, 244.
appeal from removal and new appointment, 244.
pending appeal does not stay decree, 244
after removal, 244
beneficiary's claim against removed trustee, 244.
foreign trustee, removal, 244–245.
transfer of title on removal, 239, 245.
of donee of power, see DONEE; EXECUTOR.
RENTS, PROFITS, AND INCOME.
(1) *In general.*
(2) *Corpus and income distinguished.*
(3) *Deductions from gross income.*
(4) *What not deducted.*
(5) *Method of apportioning burdens.*
(6) *Apportioning rents and annuities.*
(7) *From when and to when computed.*
(8) *Receipt of rents.*
(9) *Application of rents.*
(10) *Rents undisposed of.*
(1) *In general.*
See PERSONAL PROPERTY; PURPOSE; ACCUMULATION; POWERS (4).
as trust corpus, 308.
assignment of, see ASSIGNMENT BY BENEFICIARY.
gross sum and rents distinguished, see ASSIGNMENT BY BENEFICIARY (1) *b*; LEGACY; ANNUITY.
rents and profits regulated like future estates, 277, 372.
cestui may agree with testator to release claim on rents, 384.
(2) *Corpus and income distinguished*, 312–320.
See also *infra* (9).
intent controls, 312.
land, increase in value, 313.
same in land bought in on foreclosure, 313.
insurance payments, fire, life, 313, 319.

The references are to pages.

RENTS, PROFITS, AND INCOME—*Continued.*
bond and mortgage, rise in value, 313–315.
government bonds, rise in value, 313–315.
if purchased at premium, 315.
sinking fund then to be established, 315, 329, 335.
stock, rise in value, extra issue, 315–319.
distribution of treasury stock, 317.
dividends—cash, scrip and stock, 315–319.
interest accruing daily, 317, 318.
proceeds of corporation plant, 317–318.
distribution of surplus, 318.
privileges and options to take stock, 318.
consolidation, extra issue to equalize, 319.
decline in value of stock, 319.
life insurance policy, 319.
unearned premium under, 319.
profits on contract of testator, 319–320.
payments on account of debt, 320.
applying corpus to use of beneficiary, see RENTS AND PROFITS (9)
(3) *Deductions from gross income*, 320–329.
what deducted, 320–323.
intent controls, 320–321, 322, 323, 325.
if contrary to usual rules, must be clear, 323, 325.
rents, income, etc , mean *net*, 320.
ordinary taxes deducted, 321.
exception, 327.
interest on loan to avoid tax, 321.
if tax paid by beneficiary, 321.
when tax payable by executor, 321.
current expenses deducted, 322.
trustee's commissions, what deducted, 322, 329.
ordinary repairs deducted, 322.
special improvements deducted, 322
interest on encumbrances deducted, 322.
if remainderman pays, remedy, 322.
payments under testator's covenants deducted, 323.
legal and clerical services, when, 328.
miscellaneous deductions, 322–323
exceptions, varying general rules, 323.
sinking fund, 315, 329, 335.
(4) *What not deducted*, 323–329.
either charged wholly to corpus, 323–329.
or partly to income, partly to corpus, 323–329.
in general, trustee cannot charge corpus, 323–329.
six general exceptions enumerated, 324.
power of Legislature to charge corpus, 324.
power of court to charge corpus, 324.
eight classes of charge on corpus, 325–329.
compulsory outlays for assessments, etc., 325.
outlay to restore dilapidation, 325.
if investment in realty authorized, 325.
if outlay essential to preserve, 325.
if essential to effect revenue, 326.
expenses due to delaying a sale, 327.
improvements made under error, 328.
by one believing himself owner, 328.
in such case equity relieves, 328.
fees for legal expenses, when, 328.
premiums paid on securities, 328, 329.

The references are to pages.

RENTS, PROFITS, AND INCOME—*Continued.*
as to sinking fund to cover this charge, 315, 329, 335.
trustee's commissions on corpus, 322, 329.
(5) *Method of apportioning deductions*, 329–337.
general principles, 329–334.
two methods compared, 329–337.
respective burdens, how ascertained, 329–337.
life tenant and remainderman, 329–337.
life tables, when to be used, 329–337.
dower, adjusting burdens, 336.
sale of corpus to raise funds, when, 337.
mortgage for same purpose, when, 337.
with or without court order, when, 337.
See TRUSTEE (5).
devastavit, apportioning loss, 337.
presumption whether corpus or income wasted, 337.
(6) *Apportioning rents and annuities*, 337–340.
See LEASING; ANNUITIES.
three distinct cases, 337–340.
lease terminating between pay days, 337–338.
executor of lessor may recover, 338.
interest in, terminating between pay days, 338.
who entitled to recover, 338–339.
devolution of interest between pay days, 339–340.
latter case, no apportionment, 340.
apportionment among co-tenants, 340.
(7) *From when and to when computed*, 340–342.
under trusts, 340–341.
legacies, when payable, 340–341.
interest on, from when computed, 128, 179, 340–341.
income for life, computation, 341.
under trusts, income when payable, 341.
exception, 341.
annuity, from when runs, 341.
same, when payable, 341.
fund to make good possible deficiency, 341, 681 note.
interest on, how computed, 341.
setting off separate trust fund, 341–342.
effect on computation of interest, 341–342.
power to appoint legacies, 342.
such case, from when interest runs, 342.
(8) *The receipt of rents*, see LEASING; PURPOSE (1) *c*; POWERS (4).
authority to receive, is essential, when, 99, 439, 352–399.
importance in trusts to pay debts, 99, 439.
not if testamentary, when, 99, 439.
word "rents" not essential, 100.
specific authority not needed, 100.
may be inferred, 100, 436.
must be actual, 100.
illustrations of implied, 100.
rents, authority to receive, implied, 23, 100, 436.
when authority to receive, implies trust, 100.
gift of rents, when carries corpus, 31, note, 266.
incidental and temporary receipt of rents, 101.
to receive, amalgamate and divide, not trust, 101.
rents, for what purpose may be given, 101.
mere power to receive pending sale, no trust, 101.
trust when implied from authority to receive, 101.
when not, 101.

The references are to pages.

RENTS, PROFITS, AND INCOME—*Continued.*
when in personal property, 101.
when trustee may sue for rent, 103.
power to receive, 503–504.
to receive rents and pay out corpus, not trust, 101.
merely to receive, not a trust, 101.
receipt of rents, see also *infra* (9).
(9) *Application of rents*, 292, 352–376, 381–384.
method of applying rents, 352–356, 357–368, 376.
"pay over" equivalent to "apply," 353, 354.
trustee must be authorized to receive, 352–376.
otherwise trust is passive, 396–399.
See ATTEMPTED TRUSTS.
to "manage and dispose of rents," 354.
that *cestui* "shall receive" rents, 354.
that trustee shall "use" for *cestui*, 354.
or shall "appropriate" for *cestui*, 354.
or "manage, control and render," 354.
"dispose of on *cestui's* receipt," 354.
rents to one, power to manage to another, 354.
to "receive" or to "apply" when implied, 354.
to "hold and use," 354.
to "suffer grantor to occupy," 354–355.
trust to suffer *cestui* to receive, 355.
such trusts invalid, 352–376.
to permit *cestui* to take, 355.
if trustee no discretion, invalid, 352–376, 396–399.
to permit *cestui* to occupy, valid, 355.
because trustee not directed, 355.
if *cestui* entitled to possession and rents, 355, 396–399.
such trust invalid, 355, 356, 396–399.
See ATTEMPTED TRUSTS (3).
legal title to *cestui*, rents to trustee, 355.
deed, *habendum* to secure grantor's support, 356.
creates no trust, 356.
But see 602, 643.
trust to pay annuities, 381–384.
trust to hold and use for *cestui*, 356.
does not cover receipt of rents, 356.
creator reserving right to occupy, 356.
such trust invalid, 352–356, 396–399.
contrasted with reserved right to revoke, 356.
latter consistent with valid trust, 356.
application of distinction to personalty, 356.
trustee may allow *cestui* to occupy, 357–360.
liability to account, in such case, 357.
right to commissions in such case, 357.
if *cestui* occupies, he pays taxes, 357.
also pays mortgage interest, etc., 357.
trustee may re-enter at any time, 357.
if necessary may bring ejectment, 357.
trustee may loan funds to *cestui*, 147, 357–358, 379.
on mortgage on lands bought by *cestui*, 147, 358, 379.
cestui then owns the land, 358.
and mortgage represents trust fund, 358.
cestui entitled to occupy such land, 358.
cestui's right to direct application of rents, 358.
unreasonable refusal by trustee, 358.
ground for removal, 358.

The references are to pages.

RENTS, PROFITS, AND INCOME—*Continued.*
must use discretion in applying, 358.
should not pay over to drunkard *cestui*, 358.
nor to lunatic *cestui*, 358, 654
nor if waste to be expected, 358.
certain discretion belongs to trustee, 358.
refusal to pay over to *cestui*, 358–359.
when refusal proper, 358–359.
estoppel of competent *cestui*, 359.
cannot make trustee pay twice, 359.
discretion same as to realty and personalty, 359.
trust for *cestui's* support, 359.
if *cestui* has other means, 359.
or if able to support himself, 359.
yet is still entitled to trust income, 359.
trustee cannot compel *cestui* to occupy, 359.
nor to live at a certain place, 359.
where beneficiary is infant, 360–361.
how should trustee then apply, 360.
to whom may he pay them over, 360.
payments by trustee to guardian, 360.
duty to oversee guardian, 360.
duty of guardian to oversee trustee, 360.
applying rents directly, 360.
paying to infant's parents, 360–361.
application of distinct shares, 361.
if one beneficiary dies, disposition of his share, 361.
may go to the others, 361.
or may be undisposed of, 361.
trust to apply part of rents, 361.
gives trustee title to entire corpus, 361.
to apply as much as needed, 361.
surplus may then fluctuate, 361.
to support one first, balance to another, 361.
trustee may be entitled to part, 361.
to apply all for one, except what another needs, 361.
trust for support, 361, 362.
fixing amount thus required, 362.
by whom determined, 362.
discretion to increase payments, 362.
does not warrant decrease, 362.
but warrants successive increase, 362.
if specific sum set apart, 362.
effect of this on power to increase, 362.
discretion to withhold rents, 362.
or to increase or decrease payments, 362.
when exercised by all, 362.
when by majority, 362.
when by court, 362.
discretion to apportion rents, 362.
if improperly exercised, equity interferes, 363.
but not otherwise, except when, 363.
abuse of discretion, 363.
applying rents by offsetting claims, 363.
as where trustee loans to *cestui*, 363.
loan on *cestui's* bond, 363.
may then give *cestui* receipt for interest, 363.
this equivalent to collecting and applying rents, 363.
making up deficiency in rents, 363.

The references are to pages.

RENTS, PROFITS, AND INCOME—*Continued.*
as, from corpus, when, 363–364.
or from future surplus, 364–365.
fund to supply such deficiency, 341, 364, 365–366.
fund to supply deficiency in corpus, 341, 681 note.
if required, computation of interest on, 341.
storing up surplus to meet future shortage, 365–366.
rents payable to *cestui* out of State, 366.
application of rents on condition, 366.
if illegal or impossible, effect, 366.
trust to apply corpus, 143, 366–368, 380.
valid as to personalty, 366–367.
not as to realty, 366.
valid under a power, 366.
may be conditional, 380.
remainder of surplus, if any, valid, 367.
such remainders considered, 367.
See Beneficial Powers.
application of corpus.
discretion to apply corpus, 367.
power of court to compel, 367.
trustee must not, unless empowered, 367.
corpus belongs to remainderman, 367.
applying corpus to life beneficiary, 367.
See Leasing; Sale; Trustee (5); Judicial Control.
court cannot direct it, 367.
Legislature cannot authorize it, 367.
See Legislative Control.
if remainderman is infant, etc., 367–368.
See Infant.
then Legislature and court may authorize, 367.
when court has inherent power, 367–368.
when only has statutory, 367.
application of corpus by trustee, 367–368, 654.
when court will approve afterward, 368.
See Judicial Control.
may approve as such, if correct in essence, 368.
though trustee invest on wrong theory, 368.
depletion of corpus, consent of remainderman, 368.
allowance from corpus pending probate, 368.
trustee applying corpus to his own use, 368.
trust instrument may authorize, 368.
to apply incidental rents, 376.
to sell, and meantime apply rents, 376.
not valid as a trust, but as power, 376.
deducting *cestui's* debts from rents, 376.
(10) *Rents undisposed of*, 361, 368–376, 447.
See Powers (4).
who entitled to such, 368–376, 447.
meaning of "rents undisposed of," 369.
if "to apply all," none "undisposed of," 369.
even if all not needed for support, 369.
if payment merely postponed, 369.
this is not "undisposed of," 369.
if covered by residuary clause, 369.
then not "undisposed of," 369.
next eventual estate, 261, 368, 370–376.
who presumptively entitled to, 368, 370–376.
when such take "rents undisposed of," 368, 370–376.
statute covering this case, 368, 370–374.

The references are to pages.

RENTS, PROFITS, AND INCOME—*Continued.*
when statute applies, 370–374.
only where there is a valid suspension, 370.
this must be caused by an expectant estate, 370–374.
also, there must be specific property, 370.
these points discussed, 370–376.
what is such "expectant estate," 370–374.
history of foregoing statute, 372–373.
rents and profits, governed by rules as to future estates, 372.
bearing of this statute, 372.
as to suspension of alienation, see 272–281.
RENUNCIATION, 80, 235–237.
See TRUSTEE; JUDICIAL CONTROL; EXECUTOR.
after accepting, cannot renounce, 124.
if one of several renounces, 124, 236–237.
title, powers and duties of survivors, 236–237.
if discretion given to trustee, 237.
retraction of renunciation, 237.
devolution of title, 124, 235–237.
by donee of power, see DONEE.
RES ADJUDICATA. See DECREE; ESTOPPEL; TRUSTEE (4); ACTIONS.
RESERVATION OF POWER. See POWERS (5); RENTS AND PROFITS (9); REVOCATION; SUSPENSION; TAX; THIRD PARTIES (1).
RESIDUARY CLAUSE. See ATTEMPTED TRUSTS (8); RENTS AND PROFITS (9).
RESIGNATION, 237–240.
See TRUSTEE; EXECUTOR; JUDICIAL CONTROL.
control of court over, 124, 237, 238.
provisions of trust instrument, 238.
grounds, 238.
proceedings, 238, 239.
if trustee also executor, 239.
if trustee also donee of power, 239.
See DONEE.
devolution of title, 124, 239.
statutes relate only to express trusts, 240.
where trust is void or ended, 239, 240.
jurisdiction, 239, 240.
may retain title after resigning, 239.
whether conveyance to successor requisite, 239.
by donee of power, see DONEE.
REVERSION, 97, 98, 248.
See CREATOR OF TRUST.
reversioner as trustee of present trust, 248, 249.
reversioner as *cestui* of present trust, 248, 249.
possibility of reverter, 98.
creator of trust for creditors, 287.
REVOCATION, 101, 102, 356, 412–414, 566–568, 577.
insurance in trust, irrevocable, 413.
creator's ignorance of irrevocability, effect, 413.
omission of power to revoke, 413.
when equity will reform, and insert power, 413.
delivery of instrument revoking, 413.
method of revocation, 413–414.
oral revocation, 37.
power to revoke as badge of fraud, 413–414.
reserved power to modify, 414.
absolute reserved power to revoke, 25, 356, 414, 460.
renders grantor owner as to whom, 414.
same as to personalty, 414.

The references are to pages.

REVOCATION—*Continued.*
recording revocation, 414.
powers of revocation, 566–568.
executed transfer irrevocable, 41, 43.
power to revoke power, 566.
power to revoke grant, 566–567.
power to revoke execution of power, 567–568.
testator or donee revoking will before decease, 101, 105, 566–568.
See TERMINATION.

SALE. See TRUSTS; POWERS; PURPOSE; TRUSTEE (5); CONTRAVENTION OF TRUST; EXECUTION OF POWERS; JUDICIAL CONTROL; LEGISLATIVE CONTROL; ESTATES; VESTING; REMAINDER; INFANT; DONEE; RENTS AND PROFITS (9).
SAVINGS BANK DEPOSITS, 46–49, 55, note, 654.
SEAL, 22, note, 36, 42, 64, 66.
omission of mention of, in Real Prop. L., 42, 64.
unnecessarily attached, effect, 37, 43
bearing of on consideration, 64–66, 268, 269.
See TRUST (9).
not required in a will, 66.
SECRET TRUSTS. See ATTEMPTED EXPRESS TRUSTS (6); TRUSTS (2).
SECURITY. See BOND; COSTS; EXECUTOR.
SEPARABILITY, 102, 103, 623–628.
See PURPOSE (1) *c*.
when valid portions stand, though others invalid, 102, 297, 409, 623–628.
general principles and illustrations, 623–628
application of, to trust for accumulation, 624–625.
application of to powers, 541–543, 627–628.
power partly valid and partly invalid, 627–628.
power ceasing in part and continuing in part, 627–628.
trust and power, one valid and other invalid, 570.
widow's election, effect on trust scheme, 604.
execution of power too extensive, effect, 539–550.
appointment partly to non-object, effect, 542–543.
SEPARATE TRUST SHARES, 124, 154–157, 681 note.
See TENANCY; TRUST TERM; INVESTMENTS; BENEFICIARY (2) *a*; ESTOPPEL; RENTS AND PROFITS (9).
effect on *cestui's* rights, 265.
beneficiary then confined thereto, 154–157, 257.
benefits by its increase, 154–157, 257.
suffers by its decrease, 154–157, 257.
no interest in other shares, 154–157, 257.
if separate fund not set off, 154–157, 257.
interest then ranges over entire estate, 154–157, 257.
setting apart separate shares, results, 156–157, 314–315.
effect on duties and liabilities of trustee, 154–157.
effect on computation of interest, 341–342.
separate funds, resigning from one, 238.
accounting as to each separately, 159.
SHARES. See SEPARATE TRUST SHARES.
SPECIFIC PERFORMANCE. See ACTIONS; PARTIES.
SPENDTHRIFT as beneficiary, 246.
See RENTS AND PROFITS (9).
STATUTES. See CONTENTS for various Tables. See CONSTRUCTION.
Revised Statutes:
relation of to prior law, 1–11, 284.
retroactive effect, 29, 284–285.

The references are to pages.

STATUTES—*Continued.*
Real Property Law :
retroactive effect, 11, 284–285.
no effect on vested rights, 29, 284–285.
effect on construction, 284–285.
for sources of Real Prop. L., see APPENDIX.
for text of corresponding sections of R. S. and Real Prop. Law, see APPENDIX.
SURETIES. See BOND.
SURPLUS. See RENTS AND PROFITS (9), (10).
SURROGATE. See JUDICIAL CONTROL ; BOND ; COSTS ; ACCOUNTING ; CONSTRUCTION ; ATTEMPTED EXPRESS TRUSTS ; ACTIONS ; EXECUTOR.
when may decree distribution under power, see DONEE (2) *c*.
when cannot authorize sale or mortgage, 681 note.
SURVIVOR. See TRUSTEE ; DONEE ; EXECUTOR ; JUDICIAL CONTROL ; RENUNCIATION ; RESIGNATION ; REMOVAL.
SUSPENSION OF OWNERSHIP. See PERSONAL PROPERTY ; TRUST TERM.
SUSPENSION OF POWER OF ALIENATION, 272–281, 559–565.
See also TRUST TERM ; RENTS AND PROFITS (10).
relation of powers to, 559–565.
suspension effected by powers, 559–565.
same, by instrument executing power, 559–565.
illustrations, 563–564.
suspension counts from creation of power, 561.
apparent exceptions, 564–565.
application of rule to reserved powers, 564–565.

TAX. See RENTS AND PROFITS.
trustee, assessment against, 116.
each liable, when, 203.
on U. S. bonds, 313, 321–322.
payment of tax by *cestui*, 321.
when payable by executor, 321.
when deducted from income, 321, 324–329.
if collected from wrong person, remedy, 322.
interest on loan to avoid tax, 321.
tax, commissions on, 221.
if *cestui* pays tax, may keep receipt, 321.
tax not "encumbrance," when, 146.
loan to avoid tax, 321.
if remainderman pays tax, 322.
if *cestui* occupies, he pays taxes, 357.
transfer tax, in general, 269–271, 523.
trust subject to, 94, 96.
as to securities held in trust, 270.
donor's power to modify trust, effect, 270–271.
non-residence, 269–271.
property not in State, 270.
trustee's own funds in trust deposit, 270.
gift *inter vivos* in trust, 270–271.
when donee takes fee, under, 455.
future estate subject to power, 455.
TENANCY. See SEPARATE TRUST SHARES ; TRUST TERM ; SUSPENSION ; BENEFICIARY ; TRUSTEE ; PERSONAL PROPERTY.
division of trust in shares, 154.
when requisite, 154.
when need not be actual, 154.
division made though not directed, 154–155.
beneficiaries as joint tenants, 258.

The references are to pages.

TENANCY—*Continued.*
as tenants in common, 258.
meaning of tenancy of beneficiaries, 258.
tenancy in common presumed, 258.
rule applies to personalty, 258–259.
trustees hold as joint tenants, 258.
tenancy preferred which sustains scheme, 259.
lapse of a beneficial share, 103.
co-tenants, one holding power to sell, see BENEFICIAL POWERS (3).
apportionment, see RENTS AND PROFITS.
TERMINATION AND EXTINCTION. See PURPOSE (1); ACCUMULATION; TRUST TERM; SUSPENSION; ASSIGNMENT; ESTOPPEL.
(1) *Of trusts*, 410–420.
when purpose ceases, 291, 410.
when beneficiary dies, 410.
when term ends, 410.
upon death of trustee, when, 287, 410.
when trustee's executor may distribute fund, 77.
upon suit by creditor of *cestui*, 410, 586–587.
upon solvency of *cestui*, 410.
upon proceedings to contest will, 410–411.
how, if contestant an infant, 411.
upon consent of third party, 411.
on exercise of power to dispose, 411.
such power in *cestui*, in trustee, 411.
trustee's power to convey to *cestui*, 411.
to sell, and turn over to *cestui*, 411.
cestui may agree with testator to release claim on rents, 384.
at discretion of trustee, 411.
court cannot exercise such discretion, 415.
power to terminate, 504.
power in trustee to consume for own use, 411.
on *cestui's* death before testator, 411.
by beneficiary as sole trustee, 75.
trust once created, continuance presumed, 411.
when termination not presumed, 411.
extension beyond useful purpose not presumed, 411.
surrender of trust deed during term, effect, 411–412.
does not terminate trust, 411–412.
nor grantor's wrongful receipt of rents, 412.
nor wrongful reconveyance to creator, 288, 289.
nor payment of fund to stranger, 412.
termination by loss of fund, 412.
termination of trust to pay debts, how, 412.
after-born child, effect on trust devise, 401, 412, 524.
termination by revocation, 412.
See REVOCATION.
termination, power of court, 414.
See JUDICIAL CONTROL.
express trusts are indestructible, 414–415.
court cannot destroy, 414–415.
cannot compel trustee to stipulate invalidity, 414.
or to consent to destruction, 414.
dissatisfaction of heirs, etc., immaterial, 414.
threatened losses immaterial, 415.
in such case, if *cestui* is infant, 415.
trusts for married women, 415–418.
statute permitting release and termination, 386, 415–418.
application of statute considered, 386, 415–418.

The references are to pages.

TERMINATION AND EXTINCTION—*Continued.*
release by *cestui*, if remainderman, 386, 418–419.
merges trust, and gives *cestui* fee, 386, 418–419.
whether statute retroactive, 419.
decree that trust is void *ab initio*, 419, note.
as for fraud or undue influence, 419, note.
where grantor to A, then conveys to B in trust, 419, note.
here A may attack trust, 419, note.
court then does not destroy trust, 419, note.
but finds that it never existed, 419, note.
trust created by minor, 419, note, 420.
disaffirmance by, 419, note, 420.
presumption that trust is ended, 420.
from lapse of time, when, 287, 420.
this statute not retroactive, 287, 420.
(2) *Of powers*, 569–577.
when purpose fails or ceases, 569–570, 604.
termination as to certain shares, 570.
by act of beneficiary, 570–571.
election to dispense with power, 563, 571–577, 601.
election to accelerate execution, 575–576.
who may elect, 563, 572–576.
election, how effected, 448–450, 576–577.
agreement by beneficial donee not to execute, 577.
extinction by merger, by revocation, 577.
sale by donee, after power ended by election, 601.
suit to enjoin such sale, 601
partition suit as method of electing, 448–450.
TESTAMENTARY TRUSTEE. See TRUSTEE; EXECUTOR; DONEE; SURROGATE; ASSETS; ACCOUNTING; BOND; JUDICIAL CONTROL; DECREE; PARTIES; RENUNCIATION; RESIGNATION; REMOVAL; COMMISSIONS; RENTS AND PROFITS (8).
defined, 90, 158.
provisions relating to, 158, 161–169.
code sections applicable to by reference, 165, 167.
uncorrected code references, construction, 642.
appointment of, 81–91.
THIRD PARTIES, 578–604.
See TRUST (3).
(1) *Creditors.*
(2) *Beneficiary's wife and children.*
(3) *Purchasers and encumbrancers.*
(4) *Remaindermen.*
(5) *Dowress.*
(6) *Debtors.*
(1) *Creditors*, 456, 578-590
See GENERAL ASSIGNMENT; PURPOSE (1) *b*.
who are under trusts for creditors, see PURPOSE (1) *b*.
of tenant of estate subject to power, 459.
when judgment overreached by power, 459.
sale of land under surrogate's order, see EXECUTOR; SURROGATE; POWER IN TRUST; DONEE (2) *a*, *b*, *c*, *d*.
enforcing execution of power, see POWERS IN TRUST; JUDICIAL CONTROL.
holding collateral may prove entire debts, see PURPOSE (1) *b*.
of creator of trust, 102, 266, 578–579.
of creator of power, 579–580.
of trustee, 580
of donee of power, 581.
See BENEFICIAL POWERS (2).

The references are to pages.

THIRD PARTIES—*Continued.*
of beneficiary of trust, 581–588.
under trust created by third party, 581–587.
right of creditors to reach fund or rents, 581–587.
only surplus rents liable, 582–587.
computing such surplus, 582–587, 590–595.
when creditor acquires lien, 583.
assignable interests subject to creditors, 380–386, 584–586.
void trust, *cestui* also heir, creditors, 586.
creditor's bill, execution returned, 586.
creditor's suit, when terminates trust, 410, 586–587.
supplementary proceedings, action by receiver, 587.
under trust for benefit of creator, 587–588.
under grant reserving power to grantor, 588.
creditors' rights, consideration, 588.
creditors of beneficiary of power, 588–589.
beneficial power, donee's trustee, assignee, committee, 588.
trust power, beneficiary's trustee, assignee, committee, 588.
judgment against beneficiary, to what attaches, 588–589.
when judgment lien follows proceeds, 588–589.
judgment purchaser, and purchaser from donee, 588–589.
creditors of one owning subject to power, 589.
title subject to power, lien of judgment, 588–590.
effect of power, on judgment, see ACTIONS.
judgment creditor's action against donee, 589.
(2) *Beneficiary's wife and children*, 590–595.
if wife and children designated in trust instrument, 590–591.
trust for trustee and his family, 590–591.
if wife and children not designated, 591–592.
if wife procure divorce, alimony, 592–595.
enforcing alimony against trust for husband, 592–595.
(3) *Purchasers and encumbrancers*, 596–602.
See REMAINDER; LIFE TENANT; MORTGAGE; DECREE; BENEFICIAL POWERS; NOTICE; EXECUTION OF POWERS; PURPOSE (1) *b*; ESTOPPEL; DECREE.
bona fide, 10, 130, 174, 288, 545.
grant, when takes effect as to, 29.
at execution sale, see ACTIONS, also *supra* (1).
encumbrance placed by life tenant, 459.
when subject to exercise of trust power, 459.
purchaser from creator of trust, 419, note, 596–597.
from creator of power, 597.
from trustee, 130, 214–215, 399, 597–600.
in general, 597–600.
entitled to clear title, 598, 601.
payment to trustee in good faith protected, 598–599.
evidence of bad faith in paying, 288, 599.
See NOTICE.
wrongful sale, fraudulent trustee may reclaim, 117, 118, 599.
purchaser from trustee not in possession, 599.
when such protected; no champerty, 599.
See CHAMPERTY.
conveyance under court order protected, 213, 599–600.
suit for purchase price, what no defence, 115.
purchaser pending suit for distribution, 600–601.
buys subject to decree, costs, etc., 600.
purchaser of land bought in by trustee on foreclosure, 149.
of land improperly bought in by trustee personally, 149.
purchaser from donee, 214–215, 600–601.
See BENEFICIAL POWERS (2).

The references are to pages.

THIRD PARTIES—*Continued.*
notice that sale improper, when, 601.
purchase pending suit, *lis pendens*, etc., 600, 601.
purchase after power is ended by election, result, 601.
payments to donee in good faith, protected, 601.
purchaser entitled to clear title, 598, 601.
purchaser from beneficiary of trust, 602.
purchaser from beneficiary of power, 602.
(4) *Remaindermen*, 602
See REMAINDER.
(5) *Dowress*, 602–604
relation of dower to power or trust, 602–604.
curtesy, 604.
(6) *Debtors.* See PURPOSE ; DEBTS.
of trust estate, as agent of trustee, 232.
offsetting claims, 232.
TIME. See TRUST TERM ; ACCUMULATION ; SUSPENSION.
of executing power, see EXECUTION OF POWER (1).
TITLE. See LIFE TENANT ; REMAINDER ; ACTIONS ; POWERS (4).
of trustee, see TRUSTEE (3) ; TRUST (5).
of beneficiary, see BENEFICIARY.
of grantor of fee to trustee, 287.
See also TRUSTEE (3) ; CREATOR OF TRUST.
of heir or devisee subject to power, see POWERS (4).
under trust operating as a power, 396.
under passive trusts, 396–399.
See ATTEMPTED TRUSTS (3).
under other ineffective trusts, see ATTEMPTED TRUSTS (8).
if vested in donee of power, 515.
effect of his unauthorized execution, 515.
TRUST. See TRUSTEE ; TRUST PROPERTY ; TRUST TERM ; ATTEMPTED TRUSTS ; PURPOSE ; TERMINATION.
(1) *In general.*
(2) *Classification and definitions.*
(3) *Express trust distinguished.*
(4) *Who may create*
(5) *Essential elements.*
(6) *The trust instrument.*
(7) *Creation and declaration distinguished.*
(8) *Delivery.*
(9) *Consideration.*
(1) *In general.*
uses and trusts, origin, history, definition, 1–6, 12, note.
changes effected by Revised Statutes, 6–11, 282–283.
effect of Real Property Law, 11, 282–283.
Real Property Law not retroactive, 29, 284–285.
trust and power may co-exist, 424, 504–505.
(2) *Classification and definitions.*
active, usefulness of, 5, 6.
passive or formal, 5.
See ATTEMPTED TRUSTS (3).
needless and objectionable, 5.
express, defined, 11.
implied, essential to prevent fraud, 6.
See ATTEMPTED TRUSTS (6).
implied, used in two senses—explained, examples, 7, *infra* (5).
charitable, 387–394.
resulting, when objectionable—illustrations, 6, 7, 36, note 1.
not abolished by statute, exceptions, illustrations, 7–9.

The references are to pages.

TRUST—*Continued.*
ex maleficio, 402–405.
See ATTEMPTED TRUSTS (6).
grant to one, consideration by another, 8, 9.
constructive, illustrations, not abolished, 7, 36.
See ATTEMPTED TRUSTS (6).
secret, 402–405.
precatory, when trust and when not, 16–18, 24, 255, 402–403.
testamentary, what is, 402–405.
void trusts, 400–402.
(3) *Express trust distinguished from* common law liability, 12–15.
agency, mere custody, debt, 12–15, 35, 37, 262.
promise for benefit of third party, 14, 262.
agreement to return surplus, 15, note.
declaration of trust, and of debt, 35
trustee is not debtor of beneficiary, 160.
admission of account, effect, 160.
grantee's agreement to support grantor, 249.
or pay annuity to grantor, 249.
deposit to secure payments, 308.
agreement to "pay interest," indicates debt, 262.
statement that fund is "drawing interest," 262.
fiduciary capacity, meaning, 15.
under Bankruptcy Act, 15.
charge on property, 15, 399.
personal charge, 16, 399.
use, 16.
power in trust, 16.
power, when inadequate, 99, 439.
does not protect property from levy and attachment, 99, 439.
why express trust then necessary, 99, 439.
special statutory trusts, 18.
pure trust, 18.
(4) *Who may create express trusts*, 19–21.
See CREATOR OF TRUST.
by grantor not in possession, 433.
See CHAMPERTY.
(5) *Essential elements of express trust.*
intent, 21, 22, 38, 48, 49, 55, 66, 67.
specified property, 17, 22.
See TRUST PROPERTY.
a trustee, 22.
See TRUSTEE.
how sufficiently designated, 18, 23, 26, 76.
in what sense is a trustee essential, 76, 78.
trust does not fail for lack of, 78, 79.
no trustee—effect, 78, 79.
a beneficiary, 22.
See BENEFICIARY.
a transfer of title, 22.
See *infra* (6); TRUSTEE.
when gift of rents carries corpus, 31, note, 266.
See RENTS AND PROFITS
grant or devise may be implied, 23, 24, 25, 26.
consistent with verbal devise to another, 24.
formal grant or devise not conclusive, 24.
perfected transfer sets up the trust, 55.
certain term, 22.
See TRUST TERM; SUSPENSION.

The references are to pages.

TRUST—*Continued.*
may be implied, 24.
certain purposes, 22, 23.
authority to receive rents. See RENTS AND PROFITS (8).
in certain trusts, 23, 99, 439.
non-essentials :
no particular phraseology required, 23, 24.
notice to trustee not essential, 25, 43.
acceptance of trust, implied, 54.
notice to beneficiary not essential, 25.
what details implied, 25.
everything implied, deemed expressed, 27.
essentials when implied, 23–26, 289.
essentials when not implied, 26, 291.
not if trust would be void, 26.
nor if power will serve, nor if fatal to scheme, 26.
(6) *The trust instrument.* See SEAL ; ACKNOWLEDGMENT ; GRANT.
delivery of, see DELIVERY.
trust deed takes effect when, 102.
after acquired property, effect of deed, of will, 43, 104.
conveyance, when essential, how executed, 27.
if deed of trust void, 102.
effect of later deed of trust, to cure defect, 102.
effect of same on intermediate liens, 102.
seal, unnecessarily attached, effect, 37, 43.
conveyance, when not essential :
not of will, nor implied, resulting or constructive trust, 28, 36, note.
definitions : real property, lands, estate, interest, 28.
conveyance defined, 28.
grant, how executed, 22, 23, 29.
acknowledgment or proof, 29.
when takes effect as to purchasers, etc., 29.
habendum clause, effect, 356, 602, 643.
(7) *Creation and declaration of trust distinguished.*
creation of trust, intent to pass title essential, 21, 22, 38, 48, 49, 55, 66, 67.
in declaration of trust, intent to declare essential, 21.
in declaration, no transfer or delivery, 22, 31.
illustrations, 32–34.
declaration, how proved, statute as to considered, 28, 32.
writings : what sufficient, when unnecessary, 28, 33, 37.
declaration, personalty, oral, 33, 37.
declaration of trust must be definite, 35, 38.
declaration, prior trust when not requisite, 29, 30.
declaration of trust by executor, 30, 154.
declaration by insolvent after assignment, 30.
declaration, against whom binding, 31.
declaration of trust, acknowledgment of debt, distinction, 35.
declaration by debtor that he holds as trustee, effect, 37.
difference in proof, 36.
declaration, as to savings bank deposits, 47.
defective gift not valid as declaration, 21, 22, 38, 48, 49, 55, 66–67.
defective declaration not valid as a gift, 21, 22, 38, 48, 49, 55, 67.
declaration, must it be published, 38–40, 67.
recording : statutes, place, seal, acknowledgment, 36, 42, 66.
incorporation by reference, 36.
(8) *Delivery*, 38–67.
what sufficient, 38–43, 44, 53, 54–67, 267–269.
when delivery impossible and not required, 38–40, 42, 49, 50, 67.

The references are to pages.

TRUST—*Continued.*
to whom delivery should be made, 15, 25, 41, 43, 54.
acceptance, when presumed, 42, 43, 54.
record not conclusive, 43.
what does not vitiate delivery, 43, 103.
See TRUSTEE (3).
statements of transferor, mental reservations, oral conditions, 43.
donor's admission of delivery, 54.
conditional or in escrow, 43.
tangible chattels, 44, 53.
stock certificates, 45, 46, 59.
compelling corporation to transfer, 45, 46, 59 60.
savings bank deposits, certificates of deposit, 46–49, 654.
of receipt, insurance policies, 49, 50, and note, 90.
bonds, promissory notes, mortgages, lottery ticket, 50–53.
registration of bonds and no delivery, 51.
remainder in chattel, 51.
right to draw deposit, bank deposits, 51–53.
debt of donee to donor, 51.
contingent future estate, equitable interests, 51, 59, 60.
claims against donee, 51, 52.
donor's own check, bond mortgage, 52–53, 66.
check or note of third person, 53, 60.
See also TRUST PROPERTY, 267–269.
equitable assignments, two classes, 53
deed of gift carries what, 44, 45, 46, 53, 59, 268–269.
bills of sale, 53.
delivery, note taken in joint names, 55, note.
deposit in joint names, 55, note.
sealed obligations, mercantile specialties, 268, 269.
carry irrevocable power to collect, 268–269.
chattels, present words of gift, 269.
on delivery, gift becomes irrevocable, 41, 43.
unless power to revoke reserved, 25.
trustee's title counts from delivery, 102.
(9) *Consideration*, 54–66, 268–269.
may be a, for a trust, 54, 55.
meaning of "voluntary" transfer, 55, 400.
immaterial if transfer complete, 55.
test of completed transfer, 57–67.
in trusts, none requisite, 55.
in declarations of trust none requisite, 56.
equitable relief if consideration, 56–67.
if transfer defective, consideration requisite, 56–67.
meaning of executed and executory, 65.
if executory agreement, requisite, 56–67.
no equitable relief to volunteer, 57–67.
ejectment against voluntary grantee, when not, 58.
donee of land by parol, 58.
donee's relief against donor if gift executory, 56–67.
donee's relief against third party, 45, 46, 58–67, 105.
compelling executors to perfect, 59–60.
"valuable," "good," "meritorious," 61–64.
marriage as, 63–64.
acceptance of trust as, 64.
trust for benefit of creator, 588.
seal, relation of to consideration, see SEAL.
false recital of consideration, 66.
sealed obligations, mercantile specialties, 268, 269.

The references are to pages.

TRUST COMPANY. See Bond.
as trustee. 68, 185, 295–297, 305.
accounting by, 159, note.
investments by, 157.
TRUSTEE. See Trust (5); Donee; Renunciation; Resignation; Removal; Executor; Judicial Control.
(1) *Who may be.*
(2) *Appointment.*
(3) *Trustee's title.*
(4) *Incidents and results of title.*
(5) *Trustee's authority.*
(6) *Duties.*
(7) *Liability.*
(8) *Rights.*
(9) *Co trustees.*
(1) *Who may be trustee*, 68, 71–73, 78, *infra* (2).
capacity to hold title essential, 22, 68, 92.
capacity and propriety distinguished, 68, 69.
beneficiary as 17, 73–75, 80, 86.
beneficiary of part, as, 74, 102, 397, 398.
court may appoint beneficiary as, 74, 75.
court may act for beneficiary as, 75.
duty of, to other beneficiaries, 75.
beneficiary as a co-trustee, 75.
electing to take absolutely, 75.
relative of beneficiary, 76.
illiterates, drunkards, infants, lunatics, idiots, 68, 69.
married women, aliens, religious persons, insolvents, non-residents, 68, 69–71.
change of residence, effect, 71.
deed from infant, lunatic, drunkard, executions, 69.
compelling conveyance from, 69.
if infant trustee conveys, cannot disaffirm, 69.
United States, State, 70.
witness to will, 73.
relative of judge; clerk of Surrogate's Court, sheriff, 76.
creator of trust as, 76, 412.
See Declaration of Trust; Creator of Trust.
"commissioners" named by court, 79.
remainderman as trustee of precedent estate, 97.
reversioner, 248–249.
Supreme Court as, when, 81–83, 606–609.
executor as trustee.
same person may be executor and trustee, 90, 105–112, 525–530.
may act in two distinct capacities, or only one, 90, 105–112.
importance of distinction, 106.
tests of which capacity, 105–112.
devolution of trust in such cases, 106, 107, 111, *infra* (2).
trustee as donee, in what capacity, see Donee (2) *e*, 106, 475, 486–492.
by what court vacancy filled in respective cases, 111.
when administrator succeeds, 106, note.
when new trustee, 106 note.
when no successor, 106, note.
renunciation of either office, effect, 107.
See *infra* (2); Renunciation, 6.
removal from either, effect, 107.
See *infra* (2); Removal.

The references are to pages.

TRUSTEE—*Continued.*
resignation from either, effect, 239.
See *infra* (2); RESIGNATION.
letters testamentary, effect on trust, 107.
revocation of letters, effect on trust, 107.
accounting, where two capacities, 159, 166.
intent important, as to distinction, 108.
the title, in each case, 108.
See *infra* (3).
mere words of bequest not controlling, 109.
bequest for life, custody in executor, 109–110, 474, 475.
legatee may give bond, and have custody, 110, 223, 474, 475.
if executor is the legatee, need not give bond, 110.
testator may confide custody to legatee, 110
legatee then trustee for remainderman, 110, 253.
trustee also executor—commissions, 224–225.
executor as trustee of lands bought by testator, 492, note.
and where testator dies before deed delivered, 492, note.
(2) *Appointment of trustee*, see *supra* (1); JUDICIAL CONTROL.
by creator of trust, 76.
See TRUST (5).
by declarant of trust, 76.
by the court, 76.
proceedings, parties, notice, 76, 77.
no appointment if trust or power invalid or ended, 77.
but *prima facie* validity enough, 77.
appointment does not determine validity of trust, 77.
when trustee's executor may act, 77.
trustee cannot attack own appointment, when, 78.
nor can his sureties, 78.
when objection to appointment waived, 78.
executor of deceased trustee cannot question, 78.
legal title pending appointment, 80.
power of survivors, 88, 91.
See *supra* (1).
appointing one who previously renounced, 237.
by Supreme Court, 78–88.
if no trustee designated, 78.
if trustee named incapable, 78, 79.
if trustee to be named in future, 79.
on death before term, 80.
where trustee renounces, 80, 235–237.
renunciation or resignation as executor, 80, 239.
where trustee is beneficiary, 80, 86.
See *supra* (1).
on death during term, 81.
trust vests in court, when, 81–83, 606–609.
court may appoint a new trustee, 83–86, 606–609.
statutes refer to technical trust, 82.
statutory term "sole," meaning, 83, 88–89.
on death of one leaving survivor, 86–87.
on resignation or removal, 87.
See those titles.
statute, refers to express trusts, 87.
and powers in trust, 87.
form of resignation, form of appointment, 88.
resignation or removal of one of several, 88.
by Surrogate's Court, 88–91.
term "sole" covers "last surviving," 83, 88–89.

The references are to pages.

TRUSTEE—*Continued*
on death, lunacy, resignation, removal, 88.
power of survivors pending appointment, 88.
form of appointment, qualifying, 88, 89.
notice, parties, bond, 89.
meaning of "trustee," 89.
not on renunciation, or failure to designate, 89.
not upon death before term, 89.
testamentary trustee defined, illustrations, 90–91.
by third party, 91.
if such power not exercised, result, 91.
must not appoint himself, 91.
(3) *The trustee's title.* See PURPOSE (1), *b*; REMOVAL; TRUST (5); REMAINDER; SALE; MORTGAGE; LEASING; ACTIONS.
legal and equitable distinguished, origin, theory, 2, 5, 91, 260, 261.
statute giving title to trustee, 92.
title in trustee essential, 22, 68, 92.
trust ineffective, trustee takes none, 406–409.
whole estate in trustee, meaning, 93, 98.
may be for life or in fee, 93, 247, 286–287, 343, 344.
for life of trustee, or of *cestui* or of third person, 344.
trust to convey remainder gives trustee no fee, 344
when trust ends, such remainder vests in possession, 344.
may be for less than life, 93.
estate is subject to trust, 94, 286–287.
trust invalid when gives no title, 94.
invalidity does not give trustee beneficial title, 406–409.
remainder after trust, 94, 247.
fee, subject to trust, 94, 95, 247, 286, 287.
absolute as to whom, 94–95, 287.
remainder absolute or defeasible, vested or contingent, 95.
remainder may be sold, etc., 95, 96.
if contingent remainderman pays off mortgage, 95–96.
subrogation, foreclosure, 96
remainder in trust beneficiary, 96, 247.
in such cases, no merger, 97, 247, 418.
release by remainderman, resulting merger, 97.
See BENEFICIARY; TERMINATION.
remainder in trustee of precedent trust, 97.
mortgage by, conveyance by, effect, 97.
the remainder may be held in trust, 247.
reversion in grantor or heirs, 97, 248.
possibility of reverter, 98.
transfer to "trustee and his heirs," 98.
equitable estate may be held in trust, 98.
authority to receive rents, when essential, 99.
See RENTS AND PROFITS (8).
trust estate to begin in future, 247, 101–102.
trust estate when vested in interest only, 101.
trust created by will, revocable, 101, 105, 566–568.
grant of future estate, not revocable, when, 101, 102.
See REVOCATION.
partly legal, partly illegal, result, 102, 409.
See SEPARABILITY.
title counts from delivery, 102.
lapse of one beneficiary's share, 103.
effect on trustee's title, 103.
title is subject to what debts, charges and liens, 103, 226.
and to what leases, etc., 103.

The references are to pages.

TRUSTEE—*Continued.*
trust legacy subject to abatement, when, 412.
trust of mortgaged property, who to pay mortgage, 103.
trustee estopped from denying trust, 103.
so also his assignee or vendee with notice, 103.
after vesting, what does not impair, 43, 54, 103, 104.
See TRUST (4).
subsequent mortgage of grantor, effect, 104.
devise by creator of trust, effect, 104.
trustee's acts in contravention, 104.
See *infra* (5).
trustee's reconveyance to grantor, 104.
continuing policy in same name, 104.
subsequent events, 104.
testator may dispose of property during life, 105, 516.
if he sells land, effect of will on proceeds, 105, 516.
declarations of creator, 104.
admissions of trustee, effect, 105.
acts of executor, 105.
deed cannot be reformed, when, 104, 413.
not at request of beneficiary, 104.
policy issued and delivered, 105.
cannot be changed, when, 105.
creator of trust, after title passes to trustee, 105, 287.
what power and rights he retains, 105, 287.
See CREATOR OF TRUST; PURPOSE.
(4) *Incidents and results of title.* See ACTIONS; PARTIES.
trustee takes title, 22, 68, 92, 113.
but subject to trust, 113, 117.
parties, when beneficiary, when trustee, 113–120, 123.
See PARTIES.
trustee, how designated, 120, 124, 125, 128, 398.
trustee both plaintiff and defendant, 123.
co-trustees act jointly as parties, 109, 123, 124, 362.
refusal of any to join, 123.
particular capacity of plaintiff, when immaterial, 114
may sue out of jurisdiction, 109, 114.
residence of party, trustee's residence, 114.
citizenship, in U. S. courts, 116.
suing foreign corporation, 114.
adverse possession against, effect on *cestui*, 115.
claim for accrued income, against removed trustee, 118, 119.
where trustee has died, 118, 119.
refusal of trustee to sue, to appeal, 119.
counter claim, offset, 123.
actions by trustee's successor, 117.
suit to avoid trustee's fraudulent acts, 117, 118.
fraudulent trustee himself may sue, 117, 118, 599.
res adjudicata. See DECREE.
when beneficiary bound by decrees, 120.
judgment for or against trustee, 120.
trustee bound in what capacity, 120.
as between trustee and beneficiary, 121.
as affecting unborn persons, 121, 122.
jurisdiction of City Court, 122–123.
taxes assessed against trustee, 116.
trustee's wife no dower, 116.
trustee's will, no effect on trust 116.
will may execute power in trust, 116.

The references are to pages.

TRUSTEE—*Continued.*
trustee's general assignment, 117.
trustees act jointly, 109, 123–124, 362.
See *infra* (9).
satisfaction of mortgage, 124.
power to divide, 124.
power to lease, 124.
See *infra* (10).
effect of lease on distinct share, 124.
disclaimer by one, effect, 124.
special power to majority, 124.
equitable conversion—conveyance, 124.
assignment of rights, to successor, 125.
successor as "creditor" of predecessor, 125.
(5) *Trustee's authority.* See LEASING; DISCRETION; JUDICIAL CONTROL.
in general, 126–134, 362, 377, 378.
to protect estate, 232.
to contract, 126–174.
to employ assistants, illustrations, 231–235.
may thus employ whom, 231–233.
authority of trustee's agent, 232.
where will names agent to be employed, 233.
such person cannot compel employment, 233.
personal liability on contracts, 126.
when trust estate liable on his contracts, 126–134.
to grant easements, 129.
to make what expenditures, see ALLOWANCES.
to compromise, 129.
not, to consent to sale in partition, when, 654.
when trustee may sell or mortgage, and what, 129–130, 337, 377, 378.
under special power, implied power, 130, 505.
effect of sale or mortgage by trustee owning remainder, 131.
acts in contravention of trust, 129–132, 337, 377, 378, 681 note.
See *supra* (3).
when court may allow sale or mortgage, 129–132, 337, 346.
power of Legislature to authorize, 129–132, 346.
scope of statute, 346–347.
rights of unborn persons, effect of sale or mortgage, 132.
grant of fee "in trust," implied power of sale, 130.
bona fide purchaser, 130.
effect of order permitting contravention, 130, 599–600.
power of court and Legislature over infants' estates, 131, 345–348.
what estate may be sold or mortgaged, 131–132.
invalid transfer, remedies of *cestui*, 132.
executing trust power, see EXECUTION OF POWERS.
invalid transfer, false recitals, 133.
personal property, 133.
authority to deal with property purchased by trustee, 134.
may mortgage land bought without authority, 134, 479.
unauthorized satisfaction piece, 134, 136, 654, note.
when may satisfy mortgage, 134, 136, 654, note.
unauthorized waiver, unauthorized interference, 134.
may sell or mortgage property bought in, 290.
trust, how granted or assigned, 28, note.
(6) *Duties.* See ACCOUNTING; INVESTMENTS; DISCRETION; FRAUD.
in general, 134–169.
must follow trust instrument, 135, 242.
must obey court, must defend trust, 135, 242.
omissions of duty, 135.

The references are to pages.

TRUSTEE—*Continued.*
wrongdoing may be active or passive, 135.
degree of diligence required, 135.
duty to retain control, 135.
duty in applying rents, see RENTS AND PROFITS (9).
duty as to fraudulent acts, etc., 136.
fraudulent taker, liability, 136.
fraud, creditors' rights, 136.
when should not discharge mortgage, 134, 136, 654, note.
subsequent purchaser, notice, 136.
recital in mortgage, notice, 136, 654, note.
undue diligence.
opposing beneficiaries, 137.
insisting on appeal, 137.
appeal by, when improper, 137.
must not antagonize the law, 137.
must not evade taxation, 137.
moral duty, 138.
must be faithful, diligent and prudent, 144.
test of due prudence, 144.
must not pledge assets to secure a bond, 117, 118, 193, 242.
to make ordinary repairs, 322.
disinterestedness, in general, 138–141, 242, 243.
applies though trustee is a beneficiary, 75.
cannot, as defendant, attack trust, 161.
may allege plaintiff has no interest, 161.
duty to allow name for appeal, 119.
personal dealings forbidden, 138.
must not buy in, nor seek personal benefit, 138.
nor trade with beneficiary, 138.
personal purchases, etc., voidable, 139.
laches in objecting, 139.
ratification, 149.
when may deal with beneficiary, 139.
rule if trust is void, 139.
disability not confined to trust property, 139–140.
illustrations, 139–141.
conveyance by trustee to himself, 139, note.
when may apply corpus to own use, 368.
disability, when inapplicable, 140–141.
if trustee renounces, disability ceases, 141.
infant beneficiary, special responsibility, 141.
may trustee share in attorney's costs, when, 208.
impartiality, 141–144.
discretion as between conflicting interests, 142, 143.
arbitrary discretion not favored, 142, 469, 471.
dishonest exercise never authorized, 142, 469–471.
interference by court, 143.
trustee as attorney for one interest, 142, 242.
ground for removal, 142.
gives no privilege of attorney, 142.
cannot refuse to produce letters, etc., 142.
must not be in hostile position, 142, 143, 242.
nor favor particular interest, 143, 144.
beneficiary's right to information, 143, note.
remainderman's right to information, 143, note.
sinking fund to equalize interests, 144.
(7) *Liability*, 169–185.
See also ACCOUNTING; INVESTMENTS; BOND; LIMITATION; JUDICIAL CONTROL.

The references are to pages.

TRUSTEE—*Continued.*
general rule, 169.
trust instrument may qualify, 169.
when court lenient, 169.
reliance on advice of testator, 169.
improper investments, 170.
liability for nuisance, 115, 349.
when both executor and trustee, 170, 183, 194.
liability to remaindermen, 170.
is trustee for them, 170.
remaindermen may have injunction, 170.
then court might require security, 170.
trust for remaindermen implied, not express, 110, 170, 253.
therefore they cannot ask his removal, 170.
no liability for omitting useless acts, 170–171.
good faith, etc., protect, 135, 171.
unauthorized sales, damage, 171.
delay in investing, 171.
See INVESTMENTS.
depositing instead of investing, 178–179.
diligence required, 171.
what leeway allowed, 171.
delay in paying, 171–172.
delay in selling, 172.
improper investment but no loss, 172.
deposit in own account, 172.
deposit in account as trustee, 172.
mingling trust and personal funds, 153, 154, 172.
See INVESTMENTS.
deposits, drafts, liability of bank, 173.
where trustee also president of bank, 173.
deposit "as trustee" does not make bank trustee, 173.
suit against wrongful recipient of deposit, 173.
such suit releases bank, 173.
when trustee liable as "acceptor," 174.
accepting draft "as trustee," 174.
accepting as "trustee," 174.
rights of *bona fide* holder, 174.
holder with notice, 174.
liability as holder of stock, 149, 150, 268.
when liable for acts of agent, 174, 201.
improperly entrusting assets, 174, 201.
usury taken by agent, 174, 202.
taking usury, 157, 174, 202.
on executory contracts, 126, 174.
for loss by theft, 175, 201.
parting with custody, when liable, 175, 201.
waste, malversation, etc., 175, 260.
when attorney-general may sue, 175.
if necessary party omitted, result, 171.
liable for profits, when, 175–179, 259.
when not liable for profits *and* interest, 176.
when liable for *net* profits, 176.
liability of estate for trustee's acts, 128, 179, 340, 341.
liability for interest, 175–177, 260.
separate wrongful investments, 176.
profits on some, interest on others, 176.
when beneficiary may elect, 175–176.
beneficiary, when must watch investments, 176.

The references are to pages.

TRUSTEE—*Continued.*
when must protest, 176.
for mingling trust and personal funds, 176.
when should unite distinct funds, 177.
liable for penalties due to neglect, 177.
for interest on commissions, when, 177.
for depositing instead of investing, 178–179.
not liable, unless breach of trust, 176.
but still liable for profits, 177.
rate of interest, 175–179, 203.
interest against the estate, 179.
summary proceeding to compel payment or delivery, 179–180.
contempt proceedings, 180, 260, 609–610.
admission of correctness of account presented, result, 160.
release from liability, 180–182.
acquiescence, ratification, waiver, estoppel, 49, 52, 181, 182, 201.
See ESTOPPEL.
res adjudicata may bind one, and not others, 181.
See DECREE.
ratification implies knowledge, 181.
bearing of knowledge of agent, 181.
release of one trustee only, 181.
release from liability for co-trustee, 201.
release by decree, 182.
liability after discharge, 182.
termination of trust does not discharge, 182.
continuing testator's business, 182–185, 308.
effect of death of, 183.
trustee estopped to deny regularity of proceedings, 192.
under void trusts:
liability for previous acts, 211–215.
acts before invalidity determined, 211–215.
if validity of trust doubtful, 212.
trustee may then apply for directions, 212.
if directed by decree, protected, 213, 599–600.
not liable for necessary expenses, 213.
allowances for protecting property, 213.
See ALLOWANCES FOR EXPENSES.
in cases of general assignments, 213.
if assignee pays debts under void, 213–214.
purchaser from fraudulent trustee, 214–215.
void power, *bona fide* purchaser, 214–215.
estoppel under void trust, 215.
laches in attacking, 215.
(8) *Rights.* See ALLOWANCES; COMMISSIONS; COSTS.
as mortgagee of the trust property, 161.
on foreclosure, must account, 161.
credited with cost of getting a bond, 193.
(9) *Co-trustees*, 195–205.
See *supra* (4).
act jointly, 109, 123, 124, 362.
are joint tenants, 258.
when one may sue or appeal alone, 203, 204.
default of one to appear, 204.
trustee suing co-trustee, 204.
admissions of one, 105, 203.
loan by one to another, 200–203.
liability for each other's acts—rules, illustrations, 175, 195–205.
parties, 171.

The references are to pages.

TRUSTEE—*Continued.*
one may redeem assets wrongfully pledged, 197.
turning over to co-trustee *as* guardian, 198.
where co-trustees also executors, 198.
where co-trustees also guardians, 198.
effect of distinct capacities, 198.
effect of "joint and several" bond, 199.
may sue co-surety, when, 199.
may sue one surety, when, 199.
right of either to retain counsel, 204.
cestui as co-trustee, results, 201, 412.
release from liability for co-trustee, 201.
release of one trustee only, 181.
notice to one affects both, 202.
usurious mortgage taken by one, 202.
co-trustees as defendants, 203.
when representative of deceased necessary, 203.
liability of each for taxes, 203.
agreement that one shall control, 204.
cannot limit beneficiary's remedy, 204.
one trustee may require other to account, 166.
TRUST PROPERTY. See PURPOSE; TRUSTS (8); TITLE.
what may be held in trust, illustrations, 14, 38–67, 125, 134, 266–269, 308, 312–320.
See TRUST (3).
may be any property, 266–269.
exception, public policy, 266.
what estates, 266–269.
further illustrations of property, see 44–67.
must be creator's own property, 401.
transfer of all one's property, meaning, 268.
must be specific property, 17.
real property, 44–67, 266–267.
personal property, illustrations, 44–67, 267–269.
estimating value under laws as to charitable bequests, etc., 269.
See CHARITABLE USES.
cash value at testator's death, 269.
trust or power to sell and consume, 269.
computation then postponed, 269.
after-acquired property of creator, see TRUST (6).
TRUST TERM. See TRUST (5); SUSPENSION; BENEFICIARY; TENANCY; PURPOSE; RENTS AND PROFITS.
term of trust, 272–281, 559–565, 654, note.
general principle, 272–273, 654, note.
if no suspension, no limit, 272.
test of suspension, 279, 563, 649.
suspension in term of years, 272.
Rev. Stat. and Real Prop. L. quoted, 273.
these statutes compared, 273, 654, note.
theory of former statute examined, 274–276.
apparent change of the theory, 274–278, 654, note.
suspension caused by trust, 274–278, 381–382.
suspension caused by contingency, 274–278.
only latter recognized by original revisers, 274.
but courts recognized both, 274.
whether law now changed, 274–278.
two classes of contingencies, 274–275.
contingent estates defined, 274.
expectant estates descendible, etc., 274.

The references are to pages.

TRUST TERM—*Continued.*
estates vested defeasibly, 275, 277.
two classes of trusts. 275.
one causes suspension. other not, 275, 351, 352.
whether present trust involves contingent estate, 277.
disposition of rents, regulated like future estates, 277, 372.
vesting and alienability distinguished, 278.
personal property, 278–279.
powers, suspension, 279, 559–565.
the statutory term of suspension, 279.
two lives only, 279–281.
when for future minority, 279–281.
in personal property, two lives only, 279–281.
"time of creation of estate" defined, 279–280.
two lives in being, 280.
suspension must then end, 280.
a minority counts as a life, 280.
but in what sense as part of life, 273.
for life of a wife or widow, 280.
when measure other than lives valid. 280.
lives may be those of beneficiaries, 281.
or of the trustees, or third parties, 281.
exception in trust for charity, 393.
exception in trust to accumulate, 281.
then measured by *cestui's* minority, 281.
but may be for child yet unborn, 281.
agreement to continue a business, 183–184.
testamentary direction as to same, 184.
rents undisposed of during suspension, 368–376, 447.
See RENTS AND PROFITS (10).
trust for class to arise in future, 255.
when valid, 255.
though trustee not notified in meantime, 255.
though *cestui* not notified in meantime, 255.
no limit to number of beneficiaries, 255.
shifting succession of beneficiaries, 255.

UNBORN CHILD. See CHILDREN.
USE. See TRUST (1), (3); RENTS AND PROFITS; PURPOSE.
USURY.
taken by trustee, 157, 202.
same by trustee's agent, 174, 202.
when borrower still liable, 202.
usury not known to trustees, 202.
same not known to beneficiary, 202.
same, borrower notified of trust, effect, 202.
trust to pay debts waives usury when, 289.

VENDEE. See THIRD PARTIES; DECREE.
buying from testator, 516.
whether donee to sell may convey to, 516–517.
delivery, see TRUST (8).
consideration, see TRUST (9).
defective transfer, relief, see TRUST (9).
VESTED ESTATES. See BENEFICIARY; TRUST TERM; SUSPENSION.
law prefers, rather than contingent, 646.
direction to pay or divide, effect on vesting, 654.
only gift lying in direction to divide, etc., 495–500, 604.

The references are to pages.

VESTED RIGHTS. See JUDICIAL CONTROL; TRUSTEE (5); MORTGAGE; LEASE; CHARITABLE USES; LEASING; STATUTES.
VOID TRUST OR POWER, 395–409, 523, 524.
See ATTEMPTED TRUST; TRUSTEE (7); FRAUD; BOND.
assignment under, 385.
invalid in part, see SEPARABILITY.
creditor's rights, 586.
void, not implied, 26.
void, curing by later deed, effect, 102.
void execution of power, 554.

WAIVER. See ESTOPPEL.
WIDOW. See THIRD PARTIES (5).
life of, to measure trust term, 280.
WIFE, of *cestui*. See THIRD PARTIES (2).
life of, to measure trust term, 280.
WILL. See TRUST (7).
power to dispose by, see BENEFICIAL POWERS; EXECUTION OF POWERS; APPOINTMENT.
creation of power by, see POWERS.
construction of, see CONSTRUCTION; CONFLICT OF LAWS.
revocation of, see REVOCATION.
after-acquired property, see TRUSTS (6).
trusts created by, see TRUST.
WITNESS TO WILL as trustee, 73.
as donee of power, 476.
not disqualified by commissions, 73.

(Whole number of pages 789.)

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